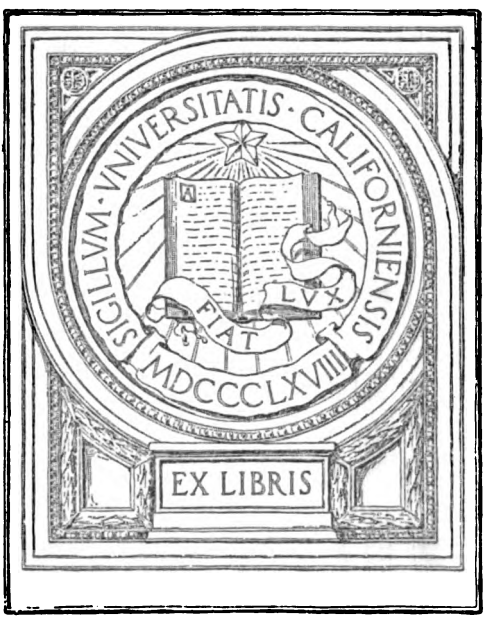

THE

York Legal Record.

A Record of Cases Decided in the Courts of York County, Pa. With Reports of Important Cases in other Counties and Abstracts of Decisions made throughout the State.

S. C. FREY, EDITOR.

VOLUME XI.

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JURISPRUDENCE

TABLE OF CASES

REPORTED IN THIS VOLUME.

TABLE OF CASES

ABSTRACTED IN THIS VOLUME.

TABLE OF CASES

CITED IN THE COURTS' OPINIONS IN THIS VOLUME.

York Legal Record.

Vol. XI. JULY, 1897. No. 1.

ORPHANS' COURT.

Eichelberger's Estate, No. 2.

Legacy—Interest on—Time.

Testator by his will gave and bequeathed "unto the Mayor and City Councils of the City of York, my native place, the sum of ten thousand dollars in trust, the principal to be invested under the direction of the Orphans' Court of York County, and the annual income thereof to be distributed among the deserving poor of York under the direction of the Benevolent Society of said City." Before the Auditor appointed to distribute the balance on the second account the Benevolent Association claimed interest for a period beginning at the testator's death, bnt the Auditor disallowed the claim. HELD, that an exception to such refusal must be sustained.

The order to invest the principal and pay the interest to the party named, makes these bequests equivalent to annuities, and the gift of an annuity, or annual sum, commences to run at the death of the testator.

The Act of February 24, 1834, P. L. 83, is not applicable, in fixing the time for the commencement of interest, whose annuities, or their equivalent, are given, and especially where ample interest is realized from the invested securities to more than pay all the annuities.

The claimant not having been represented at the first audit, the question was not raised nor adjudicated; and the claimant has a right to be made equal with the other distributees.

Exceptions to Auditor's report.

The report of the Auditor, Jno. F. Kell, Esq., is as follows:

At the meetings there appeared before the Auditor the accountants and their legal counsel, Horace Keesey, Esq; A. N. Green, Esq., and E. W. Spangler, Esq., attorneys for the York Benevolent Asso ciation and the Mayor and City Councils of the City of York, Pennsylvania, legatees and beneficiaries under the provisions of testator's will; and Edward Chapin, Esq., attorney for the President and Fellows of Yale University in New Haven, Conn., the residuary legatee under testator's will.

The balance in the hands of the accountants, $577.73, which is to be award ed in this distribution, is a balance of moneys received by the accountants after filing their second account, and is ac counted for by them in a supplemental account filed January 4, 1896, and duly confirmed by this Court. The money is claimed by the Mayor and City Councils of the City of York, Pennsylvania, under a specific bequest in testator's will, and is also claimed by the President and Fellows of Yale University in New Haven, Connecticut, as residuary legatee.

The two clauses of testator's will under which these contesting claims are respectively made are in the following language:

"I give and bequeath unto the Mayor and City Councils of the City of York, my native place, the sum of ten thousand dollars *in trust*, the principal to be invested under the direction and approval of the Orphans' Court of York County, and the annual income thereof to be distributed among the deserving poor of York City, under the direction of the Benevolent Society of said City."

"All the rest and residue of my estate I give and bequeath unto the President and Fellows of Yale University in New Haven, Connecticut, to be by them invested in the University Fund, and the income thereof to be expended by them at their discretion in defraying the current expenses of said University."

The claim made on behalf of the Mayor and City Councils of York is founded on the fact that interest on the principal sum of $10,000 passing under the specific bequest above quoted was awarded for a period commencing one year after testator's death, and the contention that interest should have been awarded for a period commencing at the death of the testator.

The auditor finds, from the record evidence submitted to him, that the various claims for interest on legacies were made on behalf of the respective legatees in the former distributions of testator's estate; that claim for interest on the above bequest of $10 000 was made on behalf of the Mayor and City Councils, and interest thereon was allowed and awarded by this Court for a period commencing one year after the death of the testator; and that the award of this Court was reviewed by the Supreme Court and affirmed; *Vide* Yale's Appeal, 170 Pa. 247.

After this decree of the Supreme Court was made, by a Joint Resolution of the City Councils of York, duly approved, the City Treasurer was authorized to receive and release for the amount decided to be due the Mayor and City Councils of York under the $10,000 bequest; and in pursuance thereof William Chambers,

City Treasurer, received from the accountants $9525 principal, the amount of the bequest less collateral inheritance, and $375 interest, and delivered his release therefor to accountants; which release was duly recorded in the Recorder's Office of York County, Pa., in Deed Book 10L, page 97.

No matter how much stronger the needs of the "deserving poor" of York may seem to your Auditor than those of Yale College, under the above facts he would feel bound to award to the residuary legatee the money to be distributed in this proceeding, not only upon the general principal of *res judicata*, but also upon the authority of Moyer's Estate, 141 Pa. 125.

It does not seem to be necessary, however, to rest an award to the residuary legatee upon this basis. Examining the merits of the adverse claims as if not already adjudicated, we find the law to be that the Act of 24 February, 1834, Section 51, P. L. 70, Pepper & Lewis Digest 1512, Sec. 179, provides that legacies, if no time be limited for the payment thereof, shall, in all cases, be deemed to be due and payable one year from and after the death of the testator. This statute merely declared what the decisions already held.

"In Koon's & Wright's Appeal we held that interest upon a legacy begins to run from the time it becomes payable, and that where no time is fixed by the will, the direction of the Act of 1834 must prevail, unless there be language or circumstances upon the face of the will showing that the testator could not have intended the legacy to be payable at the end of the year. We there said, quoting from Huston's Appeal, 9 Watts 472, 'The general rule of giving interest to the legatee from the expiration of the year is not to be extended or controverted.' * * * There is nothing on the face of the will in this case to change the time;" Yale's Appeal, 170 Pa. 242.

The above quotation is the language of the Supreme Court in construing the very will under which the Auditor's decision in this proceeding must be made. Admitting that by this same decision interest from the testator's death is awarded to legatees whose legacies are of the class or classes which the Supreme Court holds are entitled to such interest; yet the bequest of $10,000 to the authorities of the Cities of York is a bequest of a principal sum which is to be invested under the direction and approval of the Orphans' Court of York County, and the annual income of which is to be distributed among the poor, and cannot be classed as one of the excepted cases. This bequest does not vest in any particular person or persons the right to such income or any part thereof. Nothing in the nature of an annuity, or a provision for any one for life, or for the support of any one dependent on the testator, is created by this bequest. No intention of the testator to make the bequest carry interest from his death can be gathered from his will; and, in the absence of any such intention expressed or implied, the authorities are very clear that the Act of 1834 must rule. The facts in the case of Koon's & Wright's Appeal, 113 Pa. 621, referred to and approved as above in Yale's Appeal, are very nearly identical with those in the case before us. There the question was whether interest should be allowed from the time the corpus of the fund became available to those entitled in remainder or from one year after the testator's death. The Supreme Court affirmed the decision of the Court below that interest ran from one year after testator's death. It is to be presumed that this decision went as far as the statute and decisions would warrant.

The Auditor has carefully examined all the authorities to which he was referred by the learned counsel for the City and Benevolent Association, including Townsend's Appeal, 106 Pa. 271; 2 Williams on Executors 744, 746; Hilyard's Estate, 5 W. & S. 30; Flickwir's Estate, 136 Pa. 374; Eyre v. Golding, 5 Binney 472; 2 Am and Eng. Encyclopedia of Law (2nd Ed.) 387, 402, title "Annuity;" together with a number of authorities not cited. In view of the decisions and the language of the will, he can come to no other conclusion than that the bequest of $10,000 to the Mayor and City Councils of York was payable one year after testator's death, and it carried interest from the time it became payable. Interest from that time having been awarded and paid to the legatee, nothing more is now due under that bequest, and the money now for distribution goes to the residuary legatee.

To the report the following exceptions were filed:

The Auditor erred in not awarding interest for one year from the testator's death on the $10 000 legacy bequeathed to the Mayor and City Councils of the City of York in trust, the *annual* income thereof to be distributed among the deserving poor of York City, under the direction of the Benevolent Society of York.

E. W. Spangler and *A. N. Green* for exceptions.

E. Chapin for report.

April 5, 1897. BITTENGER, P. J.—The exceptions filed is as follows: "The Auditor erred in not awarding interest for one year from the testator's death on the $10,000 00 legacy bequeathed to the Mayor and City Councils of the City of York in trust, the *annual* income thereof to be distributed among the deserving poor of York City under the direction of the Benevolent Society of York."

The position taken by the Auditor, that he could not award the balance for distribution to the City of York in trust, for the deserving poor because of the authority of Mayer's Estate, 141 Pa., 125; and because of the general principal of *res ajudicata*, is erroneous and cannot be sustained.

The City was not represented by counsel at the first audit and the question was neither raised nor adjudicated, as to whether interest was payable on the legacy from the death of testator. If the City of York was awarded less than the amount due on the first distribution under the circumstances stated, the claimant, under numerous decisions, has a right to be made equal with the other distributees and legatees in this distribution, before any other awards can be made. If entitled to interest from the testator's death, on the first distribution, the exceptant is entitled to be paid that sum now so far as the fund will reach, before anything can be awarded to the residuary legatee. This is a well established equitable principle in the distribution of estates and requires the cita tion of no authorities for its support. Indeed it was virtually conceded at the argument, that the report could not be sustained on this ground.

The item of the will of decedent making the bequest, is as follows: "I give and bequeath unto the Mayor and City Councils of the City of York, my native place, the sum of ten thousand dollars *in trust*, the principal to be invested under the direction of the Orphans' Court of York County, and the annual income thereof to be distributed among the deserving poor of York under the direction of the Benevolent Society of said City."

It will be observed that the terms of the will are indentical in regard to this legacy with the language used in the bequest for the use of John Eichelberger, Sr., Julia Hartman and Eliza Peiffer, for each of whom it was ordered that moneys should be invested under the direction and approval of the Orphans Court of York County, and the interest paid to each of the parties named, annually except the interest was to be paid semi-annually to John Eichelberger, Sr., if posible.

This court held that these payments are in the nature of, and equivalent to, annuities, and that the legacies bore interest from the death of the testator; and the Supreme Court in Yale's Appeal, 170 Pa. 242, affirmed the judgment, saying, that it is a well established rule that the gift of an annuity, or annual sum, commences to run at the death of the testator. "This rule is thoroughly discussed and applied in Flickwir's Estate, 136 Pa. 374. It was Succinctly and forcibly stated by Chief Justice Tilghman in Eyre v. Golding, 5 Binn. 472, thus, "The first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death or the legatee will not receive the annuity annually during her life."

To the deserving poor of York, the testator as certainly gave an annuity in the interest on the legacy for there use, as he did to the other legatees named, to whom interest was allowed by the court, from the death of the testator. Almost the whole fund consisted of good interest bearing securities, and the interest actually received upon those, was more than sufficient to pay the annuities to the several legatees.

We can see no reason, therefore, for distinguishing between those to whom interest was allowed from the death of the testator, and the deserving poor of York. When sufficient interest was received to pay them and the other annuities, why should the deserving poor be deprived of

their annuity for the first year; they were among the first objects of testator's bounty—his needy neighbors and friends —and their first annuity should not be withheld from them, and given to the wealthy residuary legatee,

The case of Koon's and Wrigh's Appeal 113 Pa. 621, the only case cited by the counsel for the exceptant, is not applicable. There was no interest made on the fund and there was no demand for interest from the death of the testator. The only question was whether the bequest carried interest from one year after his death.

That was all that was claimed, and it was allowed as payable under the Act of February 24, 1834, P. L. 83, which provides that "legacies, if no time be limited for the payment thereof, shall in all cases be deemed to be due and payable at the expiration of one year from the death of the testator;" and that act must prevail unless there be language or circumstances apparent upon the face of the will, showing that the testator could not have intended the legacy to be payable at the end of the year.

But we have seen that this act is not applicable, in fixing the time for commencement of interest were annuities, or their equivalent, are given, and especially where, as in this case, ample interest is realized from the invested securities to more than pay all the annuities.

In the forcible language of the Supreme Court in Flickwir's Appeal, 136 Pa. 380, "there is no inherent equity in mulcting the primary legatees of solvent estates, in a year's income, for the benefit of residuaries, presumably the lowest in the scale of the testator's intended bounty."

Being unable to distinguish the annuity to the deserving poor of the City of York from that to John Eichelberger, Sr., Julia Hartman and Eliza Pelffer, in which it was decided by the Supreme Court that interest was payable from the death of the testator; we must set the report of the Auditor aside and award the balance on the account to the exceptant.

The exception is sustained and the report of the Auditor is set aside, and the balance of the fund for distribution, viz, $481.87 is awarded to the Mayor and City Councils of the City of York, for the use of the deserving poor of York, under the provision of the will of the testator already quoted.

Johnston's Estate.

Collateral Inheritance Tax—Appraisement.

The Register of Wills appointed his Deputy as Appraiser of the Collateral Inheritance Tax. HELD, that he was not a competent person to act a appraiser.

As the Collateral Appraiser is not required to be sworn, there is all the greater reason why he should be kept free from any interest, influence or bias in the discharge of his duties. The Register's compensation being fixed by the value of the appraised property, his Deputy would not be free from interest or bias in the matter.

Exceptions to Appraisement.

The questions involved are given in the Court's opinion.

E. Chapin for exceptions.

Jas. G. Glessner, contra.

March 29, 1897. STEWART, J.—This is an appeal from the collateral Appraisement made in the above estate. No formal grounds of appeal were filed, but at the argument two exceptions were taken to the validity of the appraisement, namely:—

First.—That the collateral Appraiser was the Deputy Register and therefore not a competent person to make the Appraisement.

Second.—That the value placed on the real estate $6500. was excessive.

The collateral Appraiser was W. W. Dietz, who is the Register's Deputy. Is he a competent person to act? He is in the pay of the Register and the Register's interest is his interest, or should be, and the higher the valuation placed upon the property subject to collateral tax the greater the compensation of the Register.

The Act of May 6, 1888, P. L. 79, the present collateral inheritance tax law in the 12th Section makes it the duty of the Register to appoint an Appraiser as often as and whenever occasion may require, to fix the valuation of estates, subject to collateral inheritance tax and says: "It shall be the duty of such Appraiser to make a fair and conscionable appraisement of such estates."

Neither this or any previous act on the same subject requires the Appraiser to be sworn which seems to be a causus omissus.

The Act of April 10, 1849, Sec. 12, P. L. 571 required the Register to appoint one of the appraisers of a decedent's estate

who together with the assessor of the ward or township, should be the collateral Appraisers. Both being sworn for the discharge of their other duties may be presumed to have acted as collateral Appraisers under oath. This however, was repealed within a year by Act of March 11, 1850, Sec. 2, P. L. 170, which provided that the Register shall appoint an Appraiser as often as and whenever occasion may require who shall perform all the duties required by said section, but did not provide that he should be sworn. So the law stood until the passage of the Act of 1887 above referred to.

If, therefore the collateral Appraiser is not required to discharge his duties under oath there is all the greater reason why he should be kept free from any interest, influence or bias in the discharge of his duties.

The Act of June 26, 1895, fixing the compensation of collateral appraisers and providing for the appointment of an expert appraiser also provides that no clerk or other person employed in the office of a Register of Wills shall be oppointed an expert appraiser of an estate subject to the payment of a collateral inheritance tax nor as an expert to assist such collateral appraiser. If the expert appraiser may not be such a clerk or person so employed why should any other collateral appraiser be such clerk? If one be disqualified why not the other? This Act shows the legislative view of the subject and it is hardly assuming too much to say that it was an oversight of the legislature not to have included the appraiser in the exclusive. The Register could not appoint himself and yet to appoint his deputy is to do so in effect.

I am of opinion that the deputy Register was not competent to act. As to the other question all the evidence taken was on behalf of the Appellant and shows the value to be much less than that put on the property by the appraiser. The average value put upon it by six competent witnesses was $4,000, but I am of opinion that this valuation in view of the sales of other property in the neighborhood proven by the same witnesses on cross-examination and the proven rental value and location of the property is too low and I have therefore found and fix the value of the real estate at five thousand dollars ($5,000), and direct the costs of this appeal to be paid by the estate.

From The York Daily.

SILAS H. FORRY, Esq.

On Friday, May 28th, at 2 o'clock p. m., the members of the York County Bar held a meeting in the Court Room to take action on the death of Silas H. Forry, Esq.

Hon. John W. Bittenger, P. J., was elected chairman and Richard E. Cochran, Esq., secretary.

Judge Bittinger paid a glowing tribute to the deceased, dwelling on the confidence the court had reposed in him as a practitioner, his honesty and integrity in his dealings with his clients and on his reputation as an active christian gentleman. The Judge was listened to with marked attention and in his closing remarks he stated that it was his wish that when the summons came to call us to account all would be prepared as Mr. Forry was.

The chairman then, on motion, appointed H. C. Niles, Vincent K. Keesey, Capt. Frank Geise, James G. Glessner and A. N. Green, Esqs., a committee to draft suitable resolutions, which are as follows:

The Bench and Bar of the Courts of York County are called upon to register the death of Silas H. Forry, Esq., who was admitted to practice thirty-six years ago to-day.

Mr. Forry has honored the profession by a high appreciation of its dignity and responsibilities, and by careful and conscientious performance of its duties.

His legal abilities, good judgment, gentlemanly instincts and courteous demeanor, gave him the confidence of the Court and made him a pleasant colleague and an honorable antagonist.

In his time of robust health he was a warm hearted, companionable friend; and

in illness he preserved a courage and cheerfulness that increased the admiration of his associates.

For painful months he has battled with fatal disease with manly fortitude and christian resignation.

The Bar has lost an honorable member, and the community a useful citizen.

We sympathize most heartily with his bereaved family, whose dutiful tenderness was a fitting counterpart of his loving devotion to them.

Resolved, That this expression of our appreciation of the life and character of Silas H. Forry, Esq., and our sorrow at his untimely death, be entered upon the minutes of the Court, and that a copy of this minute be sent by the secretary to the family; and as a further mark of respect the members of the bar attend his funeral.

After the reading of the resolutions, James G Glessner, Esq., who was in the office of the decedent ever since his admission to the bar in 1888, spoke briefly but earnestly of the many acts of kindness which Mr. Forry performed while he was associated with him, stating that "there are other members of Bar who knew him longer than I; also others who have had more business transactions with him, but I doubt whether there are any who have been in the same intimate relations with him as I have been. He took me into his office nine years ago and in that time has always been a friend and almost a father. All the words that could be spoken would not do him justice. He was a kind and devoted husband and father. In the office we hoped for his recovery, and to-day in praying tribute, I hope the remaining years of my life will be so spent that the members of the bar may express the many kind words for me that have gone forth for him."

Mr. Glessner was followed by A. N. Green, Geo. W. Heiges, H. H. McClune and H. C. Niles, Esqs.

The meeting was held on the anniversary of his admission to the bar, he being admitted May 28th, 1861.

COMMON PLEAS.

Commonwealth v. Still.

Extradition—Costs—Law Library Committee.

S, after trial and conviction, but before sentence, fled from justice. His recognizance was forfeited, and the money distributed according to the Act of April 3, 1867. Afterwards he was located in England, and extradition proceedings begun. The County Commissioners having refused to advance the money to bring the fugitive back, the District Attorney petitioned the Court for an order on the Law Library Committee, who had received the net proceeds of the forfeited recognizance, to advance the necessary funds. HELD, that the Committee should agree that the rule be made absolute.

That the sum asked for was larger than was thought necessary, or no provision made for the security of the fund or a proper accounting thereof, was no reason for resisting the application, since the Court's order could have provided for those things.

But the order distributing the money on the recognizance cannot be revoked after the term in which it was made: hence the rule must be discharged.

Rule to show cause why distribution of moneys made should not be revoked.

The petition on which the was granted is as follows:

The petition of Joseph R. Strawbridge, respectfully represents: That he is the District Attorney of said County of York; that Charles Still, defendant under indictment No. 95 of April Sessions, 1895, in the Court of Oyer and Terminor of said county is in custody in London, awaiting extradition to the United States and to said Court of Oyer and Terminer of said York County for sentence; that Walter B. White has been designated by the President of the United States to go for, receive and return said Charles Still to said Court for sentence; that application has been made to the County Commissioners of said County for the sum of $1,000.00 to pay the expenses of the apprehension and return of said Charles Still under said extradition proceeding, but that the said County Commissioners have refused to advance the money for so doing; that the sureties for the appearance of said Charles Still in said Court, have paid on the judgments recovered against them in the forfeited recognizances in said No. 95 April Sessions and in No. 94 April Sessions, 1895, the sum of $2,500.00, and by decree of your Honorable Court

made February 19, 1897, the sum of $1,604.24 was awarded to the York County Law Library Committee out of said moneys so recovered; that your petitioner believes that the sum of $1,000.00 will be required to pay the expense of the apprehension and return of said Charles Still to said court for sentence.

Your petitioner therefore prays your Honorable Court to revoke that portion of said decree which awards the sum of $1,604.24 to the said Law Library Committee, and advance to Walter B. White the sum of $1,000.00 to be used in the payment of the expenses of the apprehension and return of said Charles Still to the said court of Oyer and Terminer of said county for sentence, or so much thereof as may be necessary, and to make such other and further order in the premises as your Honors may seem just and proper.

And he will ever pray, &c.

To this the Law Library Committee responded:

The undersigned, in answer to the rule granted this day on the York County Law Library Committee to show cause why the prayer of Joseph R. Strawbridge, Esq., District Attorney, filed in said court this day should not be granted, depose and say.

I. That a meeting of the Law Library Committee held at 9 o'clock a. m., May 3rd, 1897, in pursuance of a notice of the intended application of said Joseph R. Strawbridge, passed the following resolution:

"*Resolved*, Moved that a committee of two from the York County Law Library Committee be appointed to appear for this Committee in the Courts of this County to except to and oppose by all legal and proper means, any application which may be made in any of said courts for the use of any of the moneys of this Committee, in the extradition proceedings for the return of Charles Still to this county for sentence, and to oppose any application to rescind the former decree of the Court by which the moneys realized on the Charles Still recognizances were paid over to the York County Law Library Committee for the uses prescribed by law."

"York, Pa., May 3rd, 1897."

"The Chairman then appointed N. M. Wanner and Horace Keesey as the Committee."

II. That in pursuance of said resolution, respondents for the York County Law Library Committee, and in pursuance of their instructions in said resolution, object to making of the order prayed for for the following reasons:

1. That by the provisions of the Act April 3rd, 1867, establishing a Law Library in the County of York, and in relation to fines, penalties, and forfeited recognizances in said County, it is provided that the money arising from fines, penalties, and forfeited recognizances, which are not by previous laws made payable to the Commonwealth, "Shall be expended for said Law Library from time to time under the direction of the president judge and a committee of at least three of the resident members of the bar of said County."

It is further made the duty of the District Attorney, by section 3rd, of said Act, "to collect such recognizances by suit, or otherwise, and to pay over the amounts thereof as soon as collected, to the treasurer of the Committee of members of the Bar appointed as herein provided, to be applied as provided in the second section of this Act."

III. Respondents further represent that in pursuance of said Act of Assembly, certain forfeited recognizances were sued out in the cases of the Commonwealth v. Charles Still, Nos. 94 and 95 of April Sessions, 1895, and the sum of twenty-five hundred dollars ($2,500.00,) was realized thereon, out of which all costs legally payable in said cases, together with the expenses of recovery of said money, was duly paid, and the balance, sixteen hundred and four dollars and twenty-four cents ($1,604.24,) was, by a decree of said court paid over to the Law Library Committee as provided by the above recited Act of Assembly. That said sum of sixteen hundred and four dollars and twenty-four cents ($1,604.24,) together with certain other moneys of said Committee were deposited at interest in the York county National Bank in the name of said Committee, which still remain on deposit.

IV. Respondents aver that upon this state of facts, and under the provisions of said Act of Assembly there has been so set apart said moneys to the York County

Law Library Committee, under said Act of Assembly, as makes them the absolute property of said Committee and not subject to diversion to any other purpose than that set out in said Act of Assembly, either by the Committee, or by the Court, and therefore said petition should not be granted.

V. Respondents aver that it is not the duty of the Law Library Committee nor within the power of the Court to make an appropriation of the said funds, or any part thereof, for the purpose set forth in the petition of the District Attorney, to wit: to pay the costs of the extradition of Charles Still from England to this country for sentence.

VI. That the amount asked for in the petition, is grossly exorbitant, being more than double any probable amount required for the actual expense of bringing said Charles Still back to this court for sentence.

VII. The County of York under the Acts of Assembly in such cases made and provided in this Commonwealth, is liable in this case, as in all others, upon delivery of the fugitive to pay the costs of extradition, and it is, in your respondents opinion, the duty of the Commissioners of York County and of the District Attorney of York County, whose official duty it is to conduct such proceedings, to extradite said fugitive.

VIII. Your respondents, and said Law Library Committee decline to assume any responsibility either financially or morally, in the premises, and decline, by their consent, to make themselves a party to, or personally, or otherwise responsible for illegal diversion of the moneys of said Committee to the proposed extradition of Charles Still. That the Committee, as a committee, and the members, as individuals, do not desire by their action to interfere in any manner with any proper legal proceedings for the extradition of this fugitive, nor is it their purpose or desire, directly or indirectly, to interfere or hinder any proper steps that may be taken for the expenses of extradition for, or become parties to, a diversion of funds in this case, which they regard as illegal, and desire to follow their duty as members of the Law Library Committee in so far as they have power, in the care and proper use of its money and their property.

They therefore pray the court to discharge said rule. And they will ever pray, &c.

J. R. Strawbridge for rule

N. M. Wanner and *Horace Keesey*, contra.

May 3rd, 1897. BITTENGER, P. J.—The recognizances were given to procure the appearance of Charles Still in court. The expenses of his arrest and production in court, in obedience to its orders, for sentence, is a part of the costs of the case, and sufficient of the money made on the recognizance, ought to be advanced for the payment of the expenses of extradition.

If his arrest had been made before the order of distribution, the court would have ordered sufficient of the moneys to be appropriated for the payment of the said expenses.

In our opinion the Library Committee should not withhold said moneys now, but should have agreed that the rule might be made absolute, and allowed that the moneys asked for be advanced to the officer named by the President, for the purpose named; the Library Committee to be reimbursed upon payment by the County, of the expense of extradition. That the sum is larger than deemed necessary by the Committee, is no reason for resisting the petition. Nor is the fact that no provision is made in the application for the security of the fund, the keeping of an account of the expenses, and for the officer's accounting to the court for the balance in his hands, after discharging his duties. The court indicated this morning that all those matters would be attended to by the court; the fund properly guarded, and provision made for the return of the fund not expended upon the return of the officer, as well as the amount expended, as approved by the court upon its payment to the officer by the county, after sentence.

It is highly desirable that the majesty of the law should be vindicated by the return and punishment of the prisoner, and the fact thus established, that criminals are not safe in any foreign country with which the United States Government has an extradition treaty. But the order of distribution cannot be revoked after the term in which it was made, in face of the opposition of the Law Library Committee; McCullough's Appeal, 47 L. I. 273.

The rule is discharged.

Grove v. Nes.

Execution—Staying of—Set off.

Defendant asked to have the execution set aside for the reason that plaintiff had attached money of his in the hands of a third party. HELD, that as no money had been realized on the attachment, the execution will not be stayed for this reason.

A plaintiff may have as many executions at the same time as the law affords, and pursue each until satisfaction is obtained on one.

Before plaintiff purchased the judgment he asked defendant as to the payment of the note and was told it was all right, and that it would be paid before it was due. HELD, that defendant was precluded from making any claim of set off that he might have against the original holder.

Rule to show cause why fi. fa. should not be set aside.

N. M. Wanner for rule.

John F. Kell and *J. St. McCall*, contra.

June 21, 1897. BITTENGER, P. J.—The grounds upon which the defendant in this case asks to have the above rule made absolute are first, that a verdict has been obtained by the plaintiff, upon an attachment against N. M. Wanner, Esq., garnishee, on a trial in which a motion for a new trial is now pending. Second, that the defendant has a right to set off amounts due on judgments now held for defendant's use, by the York Trust, Real Estate and Deposit Company, in which Charles A. Kottcamp is defendant.

The first ground of defence against this execution, is not available, for the reason that this writ is not inconsistent with the verdict of the jury in the attachment execution. No moneys have been realized upon the verdict, and further proceedings are stayed by the motion for a new trial still pending. "The general rule is that the plaintiff may have as many executions at the same time, as the law affords, and pursue each until satisfaction is obtained on one;" Pontius v. Nesbit, 40 Pa. 309.

The claim upon the second ground of defence rests upon no better foundation. There can be no set off against the plaintiff in the execution and assignee of the judgment under consideration, for the reason that before he purchased the judgment he made inquiry of the defendant as to the payment of the note, saying he was about purchasing it, and was informed by the defendant in the execution that the note was all right; that he had no objection to Grove buying it, and that he would pay it before it was due. The same was said about two other notes against Kottcamp, purchased by Grove at the same time, not yet due. This is proven by the testimony of both the plaintiff in the execution and Wm. F. Ram say, a disinterested witness.

The law of the right of an obligor to make defence to a note or obligation under seal, in the hands of an assignee, for value, is correctly ennunciated in the opinion of the Supreme Court of this State in McMullen for use of Rudy and wife v. Wenner, 16 S. & R. 18.

"Although *prima facie*, the obligor may make every defence against the assignee, which, at the time of the assignment, or notice of it, he could have made against the obligee, yet he may, by his own conduct, preclude himself from the benefit of that right. Thus, it has been held, that if the assignee call on the obligor, and inform him he is about to take an assignment of his bond, and the obligor acknowledge that it is due, without any allegation of defence, he shall not be permitted to take defence against the assignee; and this, whether his silence proceed from ignorance or design. It would be most inequitable and unjust, that he should; because, if any loss afterwards occur, it arises from the negligence or folly of the obligor, and not the default of the assignee; who has taken every pains to inform himself of the real situation of the parties; if any injury accrue, it is right that he who causes it should bear the loss. The cases all go upon the ground that the assignee has acted with good faith, and without notice of any defect of title, or valid defence, and with a wish not to ensnare the obligor, but to protect himself. As bonds are an article of commerce, and are made transferable, equitably and expressly, by an act of assembly, it would be legalizing fraud to hold any other doctrine."

"If one who is about to receive the assignment of a single bill call upon the payor to know whether he will pay the money, and is informed by him that he will; he cannot afterwards set up a de-

fence against the payment of the money to the assignee, which existed previous to such declaration;" Elliott v. Callam, 1 P. & W. 24.

These well established principles of equitable estoppel are recognized in Edgar v. Kline, 63 Pa. 327; Weaver v. Lynch, 25 Pa. 449; Scott v. Sadler, 52 Pa. 211, and numerous other cases.

"But in order that the declarations of an obligor may operate as an estoppel, in favor of the assignee of his bond, the latter must show that he or some prior assignee, was a *bona fide* purchaser for value upon the face of it;" Griffith v. Sears, 112 Pa 523.

The evidence in this case brings this transaction within the last mentioned requirement. Grove, the plaintiff, is a *bona fide* purchaser, for value, after due inquiry, and the defendant in the judgment and execution is estopped from making the defence set up here.

Besides all this, it appears, from the petition, in this application, and the assignment on the bond, that the assignment was made September , 1895, and that Wm. J. Nes, the defendant, had no title to, or interest, either legal or equitable in the judgment held by Eliza Nes against Charles H. Kottcamp, in question, until the 28th day of November, 1895, after the date of the purchase of the note upon which the execution was issued; and therefore the claim for set off of the amount claimed to be due for interest on the Kottcamp judgment, is entirely without merit.

This rule must accordingly be discharged.

The rule is discharged, and the Sheriff is ordered to proceed on the Fi. Fa.

C. P. of Lancaster Co.

Wolf v. Jacobs & Co.

Promissory note—Suit against endorser by prior endorser—Notice of protest.

An endorser on a protested note must, in order to hold a prior endorser, give such prior endorser notice of protest not later than the day following that on which he received such notice.

In a suit by an endorser on a promissory note against a prior endorser, the plaintiff is not entitled to judgment for want of a sufficient affidavit of defense, where the defense alleged in the affidavit is that the defendant received no notice of protest from the plaintiff until October 20th, which notice was mailed on October 19th, and the note was protested and notices sent to the plaintiff on October 12th.

Rule for judgment for want of a sufficient affidavit of defense.

J. W. Johnson for rule.

John E. Malone, contra.

March 30th, 1897. LIVINGSTON, P. J. —This action, as appears by the statement filed, is brought by a subseqent endorser, against a prior endorser, upon a promissory note in form following, viz.:

"Ephrata, Pa., June 10, 1896.

Four months after date, we promise to pay to the order of A. B. Hostetter, $350.00, three hundred and fifty dollars, at the Ephrata National Bank.

Without defalcation for value received.

MARTIN KINPORTS & Co."

Said note was endorsed by A. B. Hostetter, and delivered to W. M. Jacobs, doing business as W. M. Jacobs & Co., and was by said W. M. Jacobs & Co. endorsed and transferred to J. P. Wolf, the present holder thereof, and by him to other parties.

The note appears to have been protested for non-payment, at the request of the Ephrata National Bank of Ephrata, Lancaster county, Pa., the then holder of the note, exhibiting said note unto the accountant of said Bank, where payment was refused, of which the notary notified the drawer and endorsers of said note, and the protest thereof—by depositing in the Post-office at Ephrata, Pa., a notice to protest—for each of them—for him—enclosed in an envelope directed

"Martin Kinports & Co., Ephrata, Pa.

R. H. Rushton, Cashier, The Fourth Street National Bank, Philadelphia, Pa.

This done and protested at Ephrata, Lancaster County, Pa., aforesaid, the 12th day of October, A. D. 1896"—&c., &c.

The note was therefore protested and notice of protest given on the 12th day of October, 1896.

The attempt here is made by a subsequent endorser, to hold a prior endorser for the amount of the note with interest, and therefore, such subsequent endorser, wishing to hold a prior endorser, must himself give such prior endorser notice not later than the day following that on which he receives notice; if the next day be Sunday, he has until the following Monday to give notice. And the burden of proof, that he gave such notice, is upon plaintiff, J. P. Wolf. Mr. Wolf has not furnished any evidence as to the

day on which he received the notice of protest at Dayton, Ohio, nor the day on which he mailed notice at Dayton, Ohio, for W. M. Jacobs, doing business as W. M. Jacobs & Co., in Lancaster county. According to the notary's certificate which he has inserted in and made part of his statement, notice of protest, directed to him at Dayton, Ohio, was mailed at Ephrata, Lancaster county, Pa., October 12, 1896, and from the affidavit of defense filed, we learn that he did not deposit any notice of the process to the defendant here in the postoffice, at Dayton, Ohio, until October 19, 1896, and that the notice so deposited reached here on the 20th day of October, 1896, and was delivered on the day following. Under those circumstances it is asking too much of the Court to believe that a letter mailed here on October 12, 1896, did not reach Dayton, Ohio, until October 18, 1896, when a letter mailed there on the 19th reached here on ths 20th of October, 1896.

Under the law governing this case, and the facts, as they are presented, we are obliged to discharge the rule.

Rule discharged by the Court.

C. P. of Lehigh Co.

Barber v. Roth.

Mechanic's lien—Lightning rod.

Whether or not a lighthing rod on a building is a subject of mechanics' lien is a question of fact requiring the determination of a jury, in the absence of evidence or admissions as to the circumstances.

Motion to strike off mechanic's lien.

John Rupp for motion.

Frank Jacobs, contra.

November 2, 1896. ALBRIGHT, P. J. —This is a motion to strike off a mechanic's lien for a lightning rod alleged to have been furnished for and about the erection and construction of a dwelling house of the owner. The reason supporting this action is that the claim on its face shows that it is not within the mechanic's lien laws. In the answer to the rule it is averred that the house on which the rod was put, was a new one.

The court is of the opinion that it is not for it to determine, at least not without evidence or an admission as to the circumstances of the erection of the rod, whether a lightning rod is or is not a proper constitutent part of said building, or whether it is useful for its protection. It is not the case of a claim for something that is admittedly or palpably part of a dwelling, such as walls, roof, windows or doors.

The court is of the view that questions of fact, to be determined by a jury, are involved in the inquiry whether the lightning rod was furnished "in and about the erection and construction" of the house, and that at the trial of the issue under the scire facias, evidence bearing upon the questions above suggested and probably also as to when and how it was put up, if offered, ought to be received, and that upon the determination of those matters of fact the question of lien or no lien will depend; See Gardner v. Gibson, 21 W. N. C. 121; Pennock v. Brown, 14 W. N. C. 43; Dimmick v. Cook Co., 112 Pa. 573; Harrison v. Homœopathic Asso., 134 Pa. 558. Also Drew v. Mason, 81 Ills. 498; Harris v. Schultz, 64 Ia., 540.

The motion to strike off the lien is discharged.

QUARTER SESSIONS.

Road in Peachbottom and Fawn Townships.

Road law—Vacating road—Proof.

A petition for vacating and changing a road which gives no facts in support of the allegation that the old road has become useless, inconvenient and burdensome, is fatally defective, and proceedings founded thereon will be set aside.

The viewers reported that the old road "will be useless, inconvenient and burdensome when the road laid out as heretofore mentioned will have been opened." HELD, that this is insufficient to support the report and the proceedings must be set aside.

Exceptions to report of viewers.

Brenneman & Ross for exceptions.

Cochran & Williams for report.

June 21st, 1897. STEWART, J.—The order to view the road was improvidently granted, there having been no sufficient facts alleged in the petition to justify the Court in granting the order. The order was to vacate and change, and the only allegation to support this was that the part of the road purposed to be vacated had become useless, inconvenient and burdensome.

No facts were stated in the petition to support this allegation, and such were essential and their omission fatal.

Proceedings to vacate and change a road are had under Section 18th of the Act of 13th of June, 1836; Br. Purd. Dig. p. 1883, pl. 62; which gives the authority and the 23rd Section of the same Act, same book and page pl. 66, which prescribes the prequisites of the application: These are that it shall be signed by the applicants and shall set forth in a clear and distinct manner the situation and other circumstances of that part of the road designed to be vacated. This was not done in this case and the report of the viewers does not supply the defect. The whole proceeding, therefore, petition and report, are irregular and erroneous, and must be set aside; Road in Ross Township, 36 Pa. 87.

Further the petition alleged that the part of the road porposed to be vacated "has become useless, inconvenient and burdensome." The report of the viewers found "that the same in our opinion will be useless, inconvenient and burdensome when the road is laid out as heretofore mentioned will have been opened." This is not a finding of the truth of the allegation in the petition, but rather the contrary and would be insufficient to support the report, had it a proper foundation to stand upon. It is equivalent to finding that the old road has not become useless, inconvenient and burdensome, and therefore the conclusion of the viewers should have been against the change. The 6th exception is therefore sustained, and the proceedings are set aside.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Actions—Premature Suit—Award of Arbitrators.—An action on a promissory note was brought in Luzerne county and tried before arbitrators, who found in favor of the defendant "for the reason only that the suit was prematurely brought," which finding was unappealed from. Subsequently an action was brought on the note in Carbon county. HELD, that the judgment in the first suit was no bar to the second suit. The reasons assigned by arbitrators in rendering judgment are a part of the record.—*Kennedy v. Luhman*, (Carbon C. P.) 6 Northampton County Reporter 5.

Contract—Performance—Occupancy.—Where there is no substantial compliance with an entire contract there can be no recovery for the part performed. Where a contractor who agrees to do all the plumbing fails to comply substantially with his undertaking, the owner may take possession of the house and his occupancy is not an acceptance of the defective performance. But a notice to the contractor by the owner that the latter will complete the work and deduct the cost from the contract price is an election to accept the work subject to the necessary cost of completing the plumbing.—*Wilkinson v. Becker*, (Montgomery C. P.) 13 Montgomery County Law Reportor 106.

Evidence—Burden of proof.—Plaintiff in an action of ejectment claimed title to the land in dispute through sheriff's sale upon a judgment note entered of record in 1884. The defendant claimed title through a sheriff's sale in 1887 upon a mortgage given by the same person as the note, but prior to it in date. At the trial plaintiffs claimed that the title relied upon by defendants, was invalid because the mortgage upon which the property was sold had been paid before the *sci. fa.* was issued, and offered in evidence several receipts for money paid the mortgagor, the genuineness of which was denied by the defendant. The record showed the issuing of the *sci. fa.*, the sale upon the *lev. fa.* and the deed to defendant, and the evidence of defendant was strong to the effect that the receipts were forgeries. HELD to be error for the court to charge that the burden was upon the defendant to satisfy the jury that the receipts were forgeries, as alleged, and that the burden of proof had shifted from the plaintiff to defendant.—*Shrader v. The United States Glass Co*,, 27 Pittsburgh Legal Journal 428.

Power of city to require street railway company to sprinkle streets.—A municipal ordinance requiring a street railway to sprinkle the streets over which its tracks are laid, without qualifications as to time or manner, is unreasonable and void. Whether a city of the third class has the right to require such sprinkling at proper times and seasons, and making allowance for scarcity of water, not decided, but doubted.—*The City of Chester v. The Chester Traction Company*, appellant, (Superior Court of Pennsylvania, (6 Delaware County Reports 587.

York Legal Record.

Vol. XI. AUGUST, 1897. No. 2.

COMMON PLEAS.

Paup v. Patterson's Administrators.

Bail—Liability of—Cessation.

Plaintiff, being defendant in an action before a Justice of the Peace and losing his case, appealed, and asked decedent to go his security. To indemnify him, plaintiff gave an order on the County Treasurer for a larger amount than the required bail, and decedent thereupon acceded to his request. Subsequently the case was settled, plaintiff confessed judgment and the costs were paid by the bail, who also receipted for part of the costs. Plaintiff then demanded the return of the collateral, and on decedent's failure to do so brought suit against his administrators. The judgment on which Patterson was bail was not marked satisfied until after suit was brought. HELD, that the question of the time of the payment of the judgment was properly left to the jury.

If there was a liability on the part of the decedent, by reason of the judgment being unpaid at the time of bringing this suit, then it was brought prematurely, and the plaintiff was not entitled to recover.

Bnt it does not follow, in the absence of satisfactory evidence, that a judgment is not paid until it is satisfied.

Motion for new trial.

The statement in the case was as follows:

That he was the defendant in a suit brought by one Philip Kottcamp before G. W. Aughenbaugh, one of the Justices of the Peace in and for said county of York, and that on the 16th day of December, A. D. 1889, judgment was therein rendered against him for $25.55 and costs of suit.

That desiring to take an appeal in said case he asked the said William E. Patterson to go his security for same, which the latter did in the sum of $50.00, as appears by the said Justice's Docket, the date of the entry of said appeal being the 18th day of December, A. D. 1889. That before said William E. Patterson would become said security in said case this defendant gave him an order on William Eyster, then Treasurer of said county of York, for $100.00 which money said William E. Patterson afterwards collected and which was to indemnify him against any loss on account of having become security for said appeal as aforesaid.

That said appeal was entered in this court to No. 60, January Term, A. D. 1890, and on the 22nd day of April, A. D. 1890, after plaintiff in said case agreed to his claim being reduced to $18.46, this declarant confessed judgment in said case for that amount with the costs of suit all of which said costs were then paid by this declarant.

This declarant further avers that soon after this was done, that is on or about the first day of May, A. D. 1890, he demanded said $100.00 from the said William E. Patterson who refused said demand and did not during his lifetime pay or return said money to this declarant, nor has his said administrators, although requested so to do, paid the same or any part thereof, to the damage of this declarant and plaintiff in this suit in the sum of $200.00, and for this he brings this suit.

This declarant further avers that the said William E. Patterson died on the 23d day of September, A. D. 1890, and on the 29th day of September, A. D. 1890, said William E Ramsay and Wm. F. Stauffer were duly appointed administrators of his estate.

The jury found for the plaintiff, whereupon defendant moved for a new trial, the principal reason being set forth in the Courts's opinion.

N. M. Wanner for motion.

H. H. McClune, contra.

June 28, 1897. BITTENGER, P. J.—The reasons filed, assign error in the Court in refusing the defendants' first and third points. The defendants' construction is that, inasmuch as the record of this action shows that the judgment was not satisfied until the 14th day of November, 1895, the liability of William E. Patterson and his estate did not cease, on his bail for the plaintiff on the appeal, until said date; that he would have been liable for the costs of execution had any such writ or writs been issued; and that therefore said William E. Patterson had a right to retain the $100.00 received by him from the plaintiff, as collateral to indemnify him in said suretyship, until satisfaction; and that the suit was prematurely brought and the court should have given binding instructions for the defendants.

The transcript on which Patterson was bail for the costs was filed in this Court

on January 3, 1890. Judgment was confessed by Paup on April 22, 1890. This suit was brought August 14, 1891.

William E. Patterson died on September 29, 1890 The costs were paid by him before his death, he, himself having receipted for a portion of them on the docket at the time of payment. He was advised by his counsel that there was no further liability after the payment of said costs. It is claimed by the defendants that Mr. Patterson was liable for the costs of an execution or executions, issued for the collection of the judgment. We have found no case decided by the Supreme Court, that the bail in appeals from Justices is liable for costs of execution; but one case digested by Brightly, page 4199—Connell v. Flynn, 3 Law Times, (N. S.) 42, decides, "such bail is responsible for all the costs, including those of arbitration and execution."

We have not been able to consult this case for the reason that the authority cited is not at our command; but for the reason that the condition of the recognizance is "for the payment of all costs accrued or that may be legally recovered" we are of opinion that the recognizance covers the costs of execution, and said case must be held as correctly construing the act requiring the recognizance in appeals of this character, to wit: the Act of March 20, 1845, Sec. 1, P. L. 188.

The fallacy of the contention of the defendants consists in assuming, in the argument, that the judgment was not paid until the date of satisfaction, which was some four years after the commencement of this suit. It does not follow, in the absence of specific evidence of the time of payment, that it was made on the day satisfaction was entered.

Here, the parties met on April 22, 1890. The defendant in the appeal, by consent of plaintiff, confessed judgment for a less amount than the judgment given by the justice, from whose judgment the appeal was taken. Patterson paid the costs receipting for the amount payable to him, and no further proceedings appear upon the record, except satisfaction. Although no date appears to said proceedings, inasmuch as Patterson died on September 29, 1890, they took place prior to said date. We know that very frequently judgments are paid and not satisfied, and that the Legislature has passed several acts regulating their satisfaction, on payment of costs, the last act relating thereto being the Act of March 14, 1876, P. L. 7.

Doubtless the amount of the judgment was paid on the day of the payment of the costs, or soon thereafter. It appears that no execution was issued or any further liability on the part of the bail in the appeal incurred. It even appears in the defendants' offer on page 11 of the stenographer's notes of evidence, that they, through their counsel, offered to prove, "that Patterson paid the costs, and to the best of the witness's (Mr. Heller's) recollection, the amount of the judgment as finally agreed on."

The question of the time of payment of the judgment and the liability of the bail on the recognizance at the commencement of the suit, was fairly submitted to the jury, both in the charge of the Court, and in the Court's answer to defendant's second point. In the general charge we said: "But if you are satisfied that Mr. Patterson received this money as collateral security for going on this appeal, and that this liability for the appeal ceased by reason of the claim being paid, and all settled up before this suit was brought, then the verdict of the jury ought to be for the plaintiff for the amount Mr. Patterson received as collateral, less the amount of these payments of costs, $8.79, and the $10 alleged to have been paid to Mr. Heller, or such sum as the jury may find was paid Mr. Heller for his fee, with interest from the time of the bringing of the suit, which was on the 14th day of August, 1891. And, if it was $50 that he received, it will be for the $50, deducting these payments, as made on costs and to Mr. Heller, with interest from the date of the bringing of the suit, the 14th day of August, 1891. If you determine that he received either $50 or $100, and that the estate was still liable as surety at the time this suit was brought on the 14th of August, 1891, why then your verdict will be for the defendants."

The defendants' second point and answer to the Court were as follows:

"2. If the jury find from the evidence that William E. Patterson or his estate was still liable at the date of the bringing of this suit, by reason of his suretyship in the case of Kottcamp v. Paup, then

their verdict should be for the defendants."

We answer this point as follows: This point is affirmed. If there was a liability on the part of him, Patterson, still, at the time of bringing this suit, then the verdict of the jury should be for the defendants.

The jury found in this issue, we think properly, that the judgment was paid before suit was brought, and that William E. Patterson and his estate's liability had ceased before the institution of this suit.

The verdict of the jury will not be disturbed.

The motion is overruled and the rule is discharged.

In re Jackson Township School District.

Public schools—Eminent domain—Additional ground.

The School Board instituted proceedings to acquire ground adjoining a lot already occupied for school purposes but which was too small for the uses to which it was put. The exceptant to the report of the viewers alleged that it was not intended to erect a school house on the ground proposed to be taken. HELD, that the exception must be dismissed.

While the Act of April 9, 1867, P. L. 51, is not sufficiently broad and specific to remove the question from entire doubt, yet considered in connection with the act to which it is a supplement, the right to take by eminent domain land for the necessary enlargement of school grounds seems to be substantially conferred.

It is not fatal to the report of viewers, in a case of this nature, that the report is not signed by all the viewers; a majority being sufficient to act.

Exceptions to report of viewers.

The grounds for the exceptions are given in the Court's opinion.

E. D. Ziegler for exceptions.

Ross & Brenneman for report.

June 28, 1897. BITTENGER, P. J.—The proceedings in this case were under the first section of the Act of April 9, 1867, P. L. 51, entitled "A further supplement to an act for the regulation and continuance of a system of education by common schools, approved the 18th day of May, A. D, 1854."

The main question involved is whether the school directors may, by virtue of the provisions of this act, take lands in addition to those already acquired and held by the School Districts for school purposes, on which a school house is already erected, where it is not proposed to immediately erect a school house on such additionally acquired lands.

It is strenously contended, on the part of the exceptant, that it does not warrant the taking of lands for anything but building sites and appurtenances. This question is raised by one of the exceptions, and the insufficiency of the report is questioned by another exception, viz: that it is not signed by all the viewers.

The assent of all the viewers is not, expressly, required by the act. It does not even require that they all should view the premises. It provides that the viewers *or some of them* shall be sworn or affirmed and view the premises. From this we conclude that a majority of the viewers are required to qualify and act upon the view and in making the report.

The Supreme Court has said in Paradise Road, 29 Pa. 20, that, "As as a general rule of law, when several persons are authorized to do an act of public nature, they must all deliberate, though a majority may decide."

If a unanimous report were required, it would frequently defeat the necessary acquirement of lands for school purposes and defeat the beneficient object of the act. We are of opinion that a majority of the viewers may report, and therefore the first exception must be dismissed.

The fourth and fifth exceptions, as to the right of the petitioners to take the land for any purpose except a site for a school house and necessary appurtenances, are the only remaining ones relied upon by the exceptant.

The act is not sufficiently broad in its terms and as a specific in its objects, to remove from entire doubt, the right of the school authorities to take, under its provisions, land for other than building sites and their necessary appurtenances. When however, it is considered in connection with the general act of 1854, to which it is a supplement, the right to take by eminent domain, lands for the necessary enlargement of school grounds seems to be substantially conferred.

In the case of Thompson v. School District, 1 Chester County R. 493, this is decided. In that case the ground in controversy was taken and entered upon under the provisions of this act, not with the view to the erection of a school house thereon, but to enlarge the lot on which

the house then stood, found to be too small for the accomodation of the school.

Judge Butler holds that while the act of 1867, considered by itself, might lead to the conclusion that the directors are limited *to ground needed for the site of a building*, the act of 1854, provides for the acquirement, by the directors, of "suitable grounds for school purposes and suitable buildings to be erected" and that the two acts considered together, warrant the taking of land to enlarge school grounds, when buildings have already been erected and the grounds are too con fined and insufficient. He forcibly expressed his conclusion in the following language: "It is admitted that this ground might have been taken before the house was erected; that the district is not confined to so much as is necessary simply for the *building*, but may occupy whatever is required for the convenient use of the school, if taken before the building is erected; that in such case it falls within the designation of a "site for the erection of a school house." But in our judgment, when subsequently taken and made a part of the lot on which the building stands, it is as completely a part of the site as if it had been taken previously. The whole lot thus becomes the site. Too strict and confined a reading of the act would limit the district to the ground which forms the foundation of the building. In practice, without any question, the act has repeatedly received the construction here indicated; and while it might have been well to remove all room for controversy by further legislation, we think this construction is right."

We have found no other judicial construction of the act of 1867, but from the conclusions of the eminent jurist, who rendered the foregoing decision, we are not disposed to differ.

Especially do we feel constrained to agree therewith, for the reason that they are reasonable, and in the interest of the just and efficient administration of the common school system, cherished by the mases, and so potent in the advancement and maintenance of learning and good government.

The construction indicated, of the act of 1867, appears to be sustained by the Supreme Court in the case of Ferree v. The School District of Allegheny, 76 Pa. 376. The exceptant asked the court in said case to quash the petition for viewers, for the reason (among others,) that "the petition did not allege that the board of directors intended to use and occupy the lot described for the purpose of erecting thereon a school house, with the necessary and convenient appurtenances." The Court below, overruled the motion to quash and appointed viewers. This action of the court, and the overruling of the exceptions, were assigned as error.

The Supreme Court affirmed the judgment, with the remark, "Nor do we think that the ownership of the school district of an adjoining lot, will prevent the directors from taking, in addition thereto, so much ground as is necessary for the eligible sites for school houses referred to in the act where, (as here,) both the properties together do not exceed the quantity allowed by the act for such purposes."

The land appropriated in this case, together with that already occupied for school purposes, does not exceed the statutory quantity of one acre, and the proceedings appear to be regular and lawful. The exceptions are therefore dismissed.

The exceptions are dismissed.

A petition for review may be filed by the exceptant at any time previous to the August Term, at which Term the report will be confirmed and judgment will be entered, under the terms of the act of 1867, for the amount of damages, if no petition for review is previously filed.

C. P. of Allegheny Co

Milroy v. Pittsburgh, Bessemer & Lake Erie Railroad Company.

Railroad—Dwelling house—Access.

Where the plaintiff's property consists of a lot 60 by 120 feet fronting on a 50-foot street, with a two-story frame dwelling, and the railroad track, as located across the rear end of the lot, will be 19 feet from the nearest corner of the house, and the access to and from the property is not materially interfered with, a preliminary injunction to restrain the construction of the road will be refused.

Application for preliminary injunction.

The plaintiff is the owner of a lot 60 by 100 feet in the borough of Turtle Creek, fronting on Larimer avenue and extending back to a 20-foot alley, upon which is erected a two-story frame dwelling house. The defendant's railroad is

located across the rear end of the lot, cutting off a triangular corner. The road is to be constructed upon trestle work and will be about 36 feet above the surface of the ground and within 19 feet on a horizontal line from the nearest corner of the house to the rail. The access to and from the property is not materially interfered with.

Edwin W. Stowe for plaintiff.

J. H. Beal for defendant.

April 14, 1897. STOWE, P. J.—If we were to consider the case of Swift and Given's Appeal, 111 Pa. 516, as authority, it seems to me that the facts of this case, as shown by the affidavits filed, bring it fairly within its principle. If the term "curtilage" is to have any meaning other than so much ground as may be *indispensable* to the use and occupancy of a dwelling it would seem that the occupation and use of the plaintiff's ground in the manner proposed by defendants would be within the prohibition of the Act of 19th February, 1849; and in any event it seems to me that it will "essentially interfere with the proper enjoyment of plaintiff's house as a dwelling place." The fact that the track is to be built some thirty-six feet above the surface of the ground and within nineteen feet on a horizontal line from the house, is to my mind much worse, so far as danger and annoyance is concerned, than if the track was on a level with the house and much closer to it. But as to the interpretation of the term "curtilage," in Lyle v. Railroad Co., 131 Pa. 437, seems to indicate a disposition on the part of the court to limit the prohibition of the said act to the ground actually necessary to render a dwelling inhabitable without reference to its convenience or safety, if not to the house alone; and the result of a preliminary injunction would be a matter of such serious consequence to defendant, we feel constrained to refuse the application now made for a *preliminary* injunction, without reference to what our opinion may be upon final hearing.

Hafer v. Boner, No. 2.

Notes—Exchange of—Payment.

Plaintiff was the holder of a judgment note given by defendant in favor of K, and by the latter assigned to plaintiff. In a subsequent transaction between plaintiff and K, the latter gave plaintiff $150 in cash, and a new note for $754.85, which was in full of the balance then settled. The old notes, including the one on which judgment was subsequently entered, and which was on trial in this suit, were not returned to K, plaintiff alleging that they had been mislaid. Afterwards plaintiff asked K for security on the new note, and K procured B's endorsement, but B was irresponsible. After K's failure plaintiff investigated B's financial standing and finding it unsatisfactory entered judgment on the note against defendant. At the trial, the testimony of plaintiff and K was contradictory as to whether the new note was taken in payment of the old. The jury found for the defendant. HELD, that the verdict will not be disturbed.

It is no ground for a new trial that the Court failed to call attention to discrepancies in the testimony, no requests to so charge having been made by the counsel.

Motion for new trial.

The foundation of this suit is a judgment note given by defendant to Harrison Kindig and by him assigned to plaintiff, judgment having been entered upon the note, defendant obtained a rule to show cause why it should not be opened, which rule was made absolute. See Hafer v. Boner, 10 YORK LEGAL RECORD 93.

The case was then tried, and so much of the Court's charge as relates to the question of payment by the giving of a new note by K, is as follows:

Mr. Kindig's story of this transaction and that of the plaintiff are in striking contrast; and hence it becomes your duty to reconcile them. Mr. Kindig testifies that at this settlement he gave to Hafer this note for $754 85; that there was nothing said about security or bail, and that nothing was said at that time about the return of the old notes. You will observe, however, that the amount of these notes, principal and interest, as figured up by them, included the Boner note, and aggregated the amount of the settlement; so that whatever else may be said, the Boner note did enter into that settlement, and was considered settled.

Mr. Kindig says that some time after that, when he saw Hafer, he asked Hafer why he had not returned him these notes. Hafer said, making some excuse, that they had been "waylaid," meaning thereby that they had been mislaid; and that when he would come up he could get them; or, if he did not come up, and he found them,—that is, if he, Hafer, found them, he would send them to him.

They were not sent to him.—The notes were not returned

That evidence, according to my recollection, stands uncontradicted. Mr. Hafer inferentially contradicts it by saying that he did not agree to return the notes at all, unless he got security on the $754 note; and that statement of facts is not denied. You will observe that Hafer said he had them at his house, that he had mislaid them there; but that when he, Kindig, came up, he could get them; or, if he came across them, he would send them down to him. Now, his house is located at Abbottstown. The banking firm of which he was a member, and through which these notes passed, was at East Berlin; and therefore you have a right to infer from that testimony, if you believe it, that after Mr. Hafer got the $754 note, he removed the 3 notes from the bank, and took them to his home.

Mr. Kindig further testifies that 2 or 3 days after he gave this note, Mr. Hafer returned with the note, and said he wanted security on it, or bail; that that was necessary in order to put it through the bank; that it was a rule of the bank not to discount single named paper, or that in effect. He does say, however, in his testimony, that he did not want to hurt Kindig's feeling, and hence he made that statement, and that he used the bank for that purpose.

Mr. Kindig says that Hafer told him he should get bail on the note, and send it by mail to him, so that he would receive it upon his return from Norfolk; that he took the note to his stable, and there got it signed by Granville Boyle, and sent it as requested. You will observe that he says this was during the week when the note was originally made, and within 2 or 3 days after; and that the conversation he had with Hafer in reference to the retnrn of the notes was subsequent to that time.

Mr. Hafer testified that he received the note on his return home; and therefore he must have had the note with the security on it at the time he made the statement to Kindig that the notes were "waylaid," and that he could either get them, or that he would send them down. Now, that is Mr. Kindig's side of this case.

Mr. Hafer says that at the time they made this settlement he told Kindig that he must get good bail on the note, and that if he did, he would return the other note; and that he subsequently told him, when asked about the return of the notes, that he would return the notes if he got him good bail on that note. On 2 or 3 different occasions during the testimony, which was read from the depositions, this appears. Mr. Hafer repeated the declaration that he at no time agreed to return the notes without he got good bail on the $754 note.

Now, if that were the state of facts,—if it be true that the arrangement was that Kindig was to get good bail on the note before he was entitled to the return of these notes,—that is, these other notes,—then he has failed in that, and was not entitled to the return of the notes at any time.—He has failed, as has been shown on the proof here, to furnish good bail. The plaintiff has proven that Granville Boyle, the person who became the security or bail for Mr. Kindig was not responsible, and therefore was not good bail.

But no question seems to have arisen about the bail until after Mr. Kindig had made an assignment on January 3rd, 1896. Mr. Hafer, according to his own testimony, made no inquiry, excepting of his father,—or, he said of his father, and some others; but nobody seems to know Mr. Boyle; and then, after the assignment, on the 10th of January, he made inquiry here, and first learned, as he says, that Boyle was not responsible.

Now, these circumstances are to be taken into consideration by you in arriving at the conclusion whether or not at the time these parties got together and made this settlement, the $754 note was given, and accepted by Mr. Hafer in payment, among others, of this Boner note. That is the crucial point in this case; and all these other facts are simply let in to enable you to determine, or to judge, whether there was such an agreement or understanding, or whether there was not. Mr. Hafer had a right to take this additional note from Kindig, without taking it as payment of the other note; and the law presumes, in the absence of any evidence on this subject, that he took it as a conditional payment, and not as absolute payment. And that puts the burden of showing that it was taken as absolute payment upon Mr. Boner. He must

satisfy you from the transaction that the $754 note was taken as payment of his note, among others. The law does not help him; it looks the other way. That is, that it was taken as a conditional payment, and not as payment absolute. That is the legal presumption. He must overcome that by the evidence that he has offered. Now, has he done so? And in arriving at your conclusion upon that subject, you will have a right to consider every word and every act of these parties relating to it. They do not express themselves—neither Kindig nor Hafer—as to what that settlement meant. They did not say at the time of the settlement that this settles and pays the three notes that they now contend were settled and paid; and they did not say the contrary. That is, that the $754 note was taken as conditional payment. They were simply silent upon that subject; and hence you must wade through the testimony and ascertain what they really did mean by that transaction.

Now, the testimony of Mr. Kindig, who has appeared upon the stand, and the depositions of Mr. Hafer which have been read to you, as I said, are in strong opposition, the one contending for one view of this case, and the other for the other; and the law casts upon you the duty of reconciling these statements, if you can. But, if you cannot reconcile them, then you must believe the one, or believe the other. You have a right to take into consideration the manner of their testifying,—but you have not seen Mr. Hafer, for the reason that his deposition was read,—the character of their testimony, and the interests that they have at stake. And I may say that they are both equally interested, or virtually so, in this transaction. If you cannot reconcile their statement, then you must disbelieve the one, or disbelieve the other. And the burden of showing this to you, as I stated before,—that is, that this $754 note was taken in payment of the other three notes,—is upon the defendant Boner. And he must overcome that presumption by testimony.

In arriving at your verdict, the weight of the testimony is what determines. You are not to find any fact beyond all reasonable doubt, as in a criminal case; but you are to determine which way the testimony bears; on which side it preponderates, whether for the plaintiff, or for the defendant.

The jury having found for the defendant, plaintiff filed a motion for a new trial, based on the failure of the Court to call the attention of the jury to contradictions and discrepancies in the testimony.

E. W. Spangler for motion.

Geise & Strawbridge, contra.

April 5th, 1897. STEWART, J.—The only question in this case was whether or not the note of Kindig with Boyle as security was given and accepted in payment of the note in suit. This was a question of fact for the jury and they have found that it was so given and accepted. There is sufficient in the evidence to sustain this finding and therefore I am not willing to disturb the verdict.

It is true that Kindig testifies that at the time the new note was given nothing was said about it being in payment of the Boner note, or the return of the old notes, and yet it is perfectly apparent from all the testimony that this was understood, whether spoken of or not. At the meeting after Hafer retuned the note for bail, or at the next meeting after the note was given, whichever it may have been, and it is immaterial which, Kendig asked Hafer why he had not the old notes and Hafer replied that he had mislaid them in his house and when Kendig came up he could get them, or if he, Hafer, found them before that he would return them. This testimony is uncontradicted and is consistent with other conduct of the plaintiff in the transaction. The fact that Hafer sought new bail on the new note shows his intention to surrender what he had and the fact that he took the new note with Boyle as security on it and made no inquiry as to his responsibility until Kendig failed and then immediately began an investigation of the responsibility of the surety, shows that he had been relying on the new note and not on the old one. If he had relied on the old note the security on which was good, why investigate the new? Mr. Hafer's conduct was consistent with Kendig's testimony that the old notes were to be given up and evidently the jury so viewed it.

No complaint is made as to what was contained in the court's charge to the

jury, but to what it omitted to charge. It is asserted that I should have called the attention of the jury to certain alleged contradictions as to dates and a discrepancy in the calculations of the parties in making up the amount of the notes. I might answer this by saying that no points covering these matters were put to the court, or that the counsel was as competent to do this as the court, and, my recollection is, did do so with considerable force and earnestness, but my view of it is that they were not of very great importance and could only have gone to the question of the recollection or at most to the credibility of the witness Kendig so far as the alleged discrepancy of dates is concerned. And as to the m morandum book of Kendig he had testified that the calculation was made at the time of the settlement and there was nothing to impeach that testimony excepting the difference in the amounts and as to this there was no certain testimony as to how it was arrived at on either side. The price of a horse entered into the transactions and calcula tions and neitLer side showed what that price was. Hence how could there be any certainty as to the calculations and why, without full explanations of all the elements entering into them might there not honestly appear to be discrepancies? A conflict on this point would hardly be enough, even had the jury's attention been called by the court pointedly to it, to have changed the result. It would not determine the question of whether the new note was taken in payment of the old ones

A careful examination of this record does not convince me that the true solution of the matter has not been reached, I therefore overrule the motion for a new trial and direct judgment to be entered on the verdict upon payment of the jury fee.

Boll v. Boll. No. 2.

Judgment—Opening of—Consideration.

Petitioners, certain mechanics' liens creditors of the defendant in the execution, claiming a portion of the proceeds thereof, asked for an issue to determine the validity of a judgment against the same defendant claiming priority in said distribution. On the taking of testimony in support of the rule, petitioners claimed the right to call Henry Boll. HELD, that he could not be so called, and his testimony should have been rejected.

He was not such "a party to the record, or a person for whose immediate benefit this proceeding is instituted or defended, or adverse to the party calling him as a witness," as is contemplated under the Act of May 23, P. L. 158.

The testimony failing to show want of consideration, but proving that the judgment was given to preserve the plaintiff Association from insolvency brought about by the defendant's mismanagement, and also as security for shares borrowed by him from the Association, the rule for an issue must be denied.

It is not necessary to obtain the consent of the Court appointing the Receiver of the insolvent plaintiff in the attacked judgment in order to bring a proceeding of this character.

The fact that the deed from C. Roman Boll to Henry Boll was not recorded until long after the buildings described in the mechanics' liens were commenced, the materials furnished and the work done, has no merit in this contention.

If the petitioners failed to ascertain who was the owner of the real estate at the date of entry of the judgment by the respondent, or to make proper inquiry, they cannot complain of the non-recording of the deed, and claim the proceeds of sale against a valid prior lien. They must attribute their loss to their own want of vigilance and care.

Rule for issue.

Certain of the real estate of Henry Boll was sold under execution, and an auditor appointed to distribute the proceeds. Before he could make distribution, a petition was filed in the Court asking for an issue to determine the validity of the judgment on which execution was issued and under which the property was sold. This issue was granted. See Boll v. Boll, 10 YORK LEGAL RECORD 175.

The same petitioners presented the following petition, relative to another judgment against Henry Boll, and which judgment claimed precedence in the distribution of the proceeds in the hands of the Auditor.

That your petitioners claim and allege to be facts that the judgment of the Mechanics and Workingmen's Building and Loan Association of which association The York Trust, Real Estate and Deposit Company is now receiver, against Henry Boll, entered in this Court to No. 194, August Term, 1894, for $17,000.00, under which judgment the fund for distribution in the above proceeding is claimed in preference to the mechanics' liens of your petitioners, was entered upon a confession of judgment signed by the said Henry Boll, or alleged to be signed by him, and that the same was executed and delivered without any con-

sideration, and was, therefore, *prima facia*, a fraud upon the valid creditors of said Henry Boll, your petitioners being such creditors, and was confessed and entered to illegally hinder and delay such creditors, among whom are your petitioners. And further, that at the time Henry Boll executed and delivered the said confession of judgment, and at the time the said judgment was entered, Henry Boll submitted to the said Mechanics and Workingmen's Building and Loan Association a written statement and list of the properties to be bound by a judgment entered on said confession; and that the property the proceeds of sale of which is now being distributed under the above proceeding, was not included in the properties to be bound by said judgment, but was expressly excluded; and the said Mechanics and Workingmen's Building and Loan Association understood and agreed to and with said Henry Boll that the said property, sold as above, and now being distributed, should not be bound by their said judgment.

Your petitioners further avers that the said Henry Boll has commenced a proceeding in your Honorable Court to open the said last mentioned judgment and let him into a defense, and upon the hearing to set the same aside; and they refer to and make part of their allegation of facts the statements in the petition for the opening of said judgment.

Your petitioners, therefore, respectfully pray your Honorable Court to direct an issue, in such proper form as may be determined, to try the facts in dispute as above set forth.

And your petitioners further pray that, pending the determination of such issues, your Honorable Court may direct the proceedings before Jere S. Black, Esq., auditor as aforesaid, to stay.

To this petition this answer was filed:

That the said rule ought to be discharged and the said petition dismissed by your Honorable Court, first, because the said petitioners did not first obtain permission to present their said petition from the Court of Common Pleas of Dauphin County, Pennsylvania, whose appointee the said Receiver is; and second, because the said petitioner did not aver in their said petition that they were creditors of the said Henry Boll, nor that the work was done or the materials furnished to the said Henry Boll, for which they have filed their liens, at the time the said judgment No. 194, of August Term, 1894, was confessed by the said Henry Boll, to wit: on the 23rd day of March, A. D. 1894, nor at the time said judgment was entered in your Honorable Court, to wit: on the 29th day of August, A. D. 1894.

This respondent further aver that in point of fact the said petitioners had not done the work and furnished the materials in and about the erection and construction of the houses of the said Henry Boll, against which they have filed their said mechanics' liens, and were not creditors of the said Henry Boll by reason thereof, or otherwise, at the time the said judgment was entered in your Honorable Court to No. 194, of August Term, 1894, as aforesaid; and that the first work was not done in and about the erection and construction of the said houses and the materials were not furnished by the said petitioners for the erection and construction of the said houses before the first day of July, A. D. 1895, long after the said judgment had been confessed and entered as aforesaid.

This respondent denies that the said judgment, No. 194, of August Term, 1894, was executed and delivered by the said Henry Boll to the said The Mechanics and Workingmen's Building and Loan Association without any consideration, and that it was fraud upon the above named petitioners or upon any persons who were creditors of the said Henry Boll at the time the said judgment was so as aforesaid executed and delivered by the said Henry Boll to the said Building and Loan Association, or in fraud of, or with intent to hinder, delay and defraud any of the creditors of the said Henry Boll, but on the contrary this respondent avers that the said judgment was as aforesaid executed and delivered by the said Henry Boll to the said Building and Loan Association for a valuable and lawful consideration, to wit: to secure the payment of a debt of the said Boll to the said Association, at the time the said judgment was confessed, largely exceeded the sum of seventeen thousand dollars

($17,000.00,) the amount for which said judgment was confessed. And that said judgment was accepted in good faith by the said Building and Loan Association which caused it to be entered in your Honorable Court.

This respondent further denies in toto that at the time the said Henry Boll executed and delivered the said confession of judgment or at the time the said judgment was entered the said Henry Boll submitted to the said The Mechanics and Workingmen's Building and Loan Association a written statement and list of the properties to be bound by a judgment entered on said confession; and the property the proceeds of sale of which are now being distributed under the proceeding mentioned in the said petition was not included in the properties to be bound by the said judgment, but was expressly excluded. And this respondent further denies that the said The Mechanics and Workingmen's Building and Loan Association understood and agreed with the said Henry Boll that the said property, sold as above, and the proceeds of whose sale are now being distributed, should not be bound by said judgment.

This respondent also refers to its answer filed to the rule granted by your Honorable Court upon the petition of the said Henry Boll, praying your Honorable Court to open said judgment and to let him into a defence, and begs leave to make said answer a part of this answer.

This respondent does not know that "the petitioners or the mechanics' lien creditors had no knowledge or notice of the existence of the deed of C. Roman Boll and wife to Henry Boll, dated March 31st, 1894, conveying the real estate sold by the Sheriff under the above proceedings until long after the commencement of the buildings which are the foundation of their liens, nor that they had any knowledge or notice thereof until after the work and materials done and furnished on the credit of the said buildines had been done and furnished, the said buildings having been commenced about July 1st, 1895," and of this fact, if material, this respondent demands proof.

Your respondent therefore prays the Court to discharge the said rule at the costs of the petitioners.

John F. Kell for petitioners.

Cochran & Williams, contra.

June 28, 1897. BITTENGER, P. J.—The moneys made on the above Vend. Ex. on sale of certain real estate of Henry Boll, the defendant in judgment No. 194, August Term, 1894, for $17,000 00, are for distribution before J. S. Black, Esq., auditor, and said moneys, or a large part thereof, are claimed by The York Trust, Real Estate and Deposit Company, receiver for the said Building Association, now dissolved, with its assets in the hands of said receiver.

The petitioners in whose behalf the rule was granted, are claiming a portion of said moneys now in course of distribution, upon Mechanics' liens, filed in this court.

Said judgment No. 194, August Term, 1894, was confessed by said Henry Boll on the 23rd day of March, 1894, by virtue of a note and warrant of attorney upon which judgment was entered on the 29th day of August, 1894.

At the time of the execution of this note and warrant, Henry Boll was not the owner of the real estate in controversy, but the land was conveyed to him by C. Roman Boll, by deed dated March 31, 1894; which deed was duly recorded in the Recorder's Office for recording deeds in York County, on the — day of January, 1896.

The first work done and materials furnished, in the construction of the houses on said real estate claimed for in the mechanics' liens, was not before July, A D. 1895, some ten months after the entry of said judgment No. 194, August Term, 1894, and after the delivery of the said deed to Henry Boll, conveying the legal title in the premises to him.

The preliminary question of the right of the petitioners to call Henry Boll as under cross examination, need not be determined in this proceeding as we have reached a conclusion which renders this question immaterial. His testimony, in questions and answers, does not materially vary from an examination other than under cross examination; and entirely fails to show want of consideration for the $17,000.00 judgment note in question. Taken as a whole it tends strongly to prove ample consideration for the same, in shares of the association in which Henry Boll was a borrower, and also in which said Boll as an officer of the association entered into the loan for his own accommoda-

tion as well as to preserve the association from insolvency, and "to make it good." This insolvency, according to his testimony, was brought about by the mistake and mismanagement of George Fisher, attorney, and Henry Boll, clerk of the association, "by running out the series too soon—about a year too soon," upon which the board acted. Boll and Fisher were both borrowers and stockholders. It appears also that other officers of the association joined Boll in the advancement of moneys to make the association "good," at the meeting of the directors when it was agreed by Boll to give the $17,000.00 judgment; and that afterwards another series was started and shares were issued and taken by members. After all this, Boll is estopped as against the receiver, acting in the interests of the stockholders, from setting up want of consideration for the bond, given "to make the association good;" and this much the more, after he had taken out shares to represent the amount of said judgment, as admitted in his testimony.

While we regard the question immaterial here, as before stated, whether Henry Boll could be called by the petitioners for the issue in this case, as under cross examination, it is proper for us to remark in the interests of the correct practice under the 7th Section of the evidence Act of May 23rd, 1887, P. L. 158, that we are of opinion that Henry Boll is not "a party to the record, or a person for whose immediate benefit this proceeding is instituted or defended, or adverse to the party calling him as a witness," who may be called as under cross examination; and it is only because his testimony does not do any injury to the cause of the respondent, who objected to his being so called and examined, that his testimony under such cross examination is not rejected.

We do not think that the objection that the consent of the Dauphin County Court was not first obtained, to file the petition against the receiver, appointed by said court, is well founded. Such consent must first be obtained, to bring suit against a receiver. The rule does not apply in such a proceeding as this; and, further, the consent of said court has since been granted.

The note and warrant upon which the judgment for $17,000.00 was entered, was executed and delivered by Henry Boll voluntarily on his own proposition, "to make the association good," and was acted upon by other officers of the association. The business was continued, another series issued, and others of the association acted on faith of this judgment. The instrument under seal imports a valuable consideration.

We find from the evidence of Henry Boll, himself, that the judgment was given for a lawful purpose, for a valuable consideration, and this finding is also supported by the evidence of Henry Kopman and E. T. Moul.

Under the 87th section of the Act of June 16, 1836, providing for an issue in the distribution of proceeds of Sheriff's Sales, P. L. 777, "the proper practice to obtain an issue, is for the complaining creditor to file an affidavit that the judgment attacked is fraudulent and collusive, and without consideration, and that it is intended to hinder, delay and defraud creditors. On this the plaintiff in the attacked judgment may file an affidavit denying the averments; but if he will not, the court should grant the issue as a matter of course. If the plaintiff files a denial, depositions should be taken and on them the court will determine whether the issue shall be granted, subject to an appeal if the issue be refused, as provided by the Act of 1846. If a denial is filed and the applicant will not take depositions the issue should be refused;" Moore v. Dunn, 147 Pa. 359.

In this case there is a full and complete denial of the want of consideration for the $17,000.00 judgment, by the respondent; all fraud and collusion is denied, and the depositions show a valid consideration for the same.

It is urged by the petitioners that the mechanics' liens should prevail over the judgment in question, in this distribution, because the deed of C. Roman Boll, dated March 31st, 1894, to Henry Boll, was not recorded until long after the buildings described in the liens were commenced, the materials furnished and the work done. We see no merit in this contention. There is no law to require either the owner of a legal title or his judgment creditor to have the owner's deed recorded. Here, this judgment for $17,000.00 was duly entered long before the work was commenced and the ma-

terials furnished by the mechanic lien complainants. It stared them in their faces, and they were bound, for their protection, to enquire whether the land described in their liens was owned at the time of the entry of the judgment, by Henry Boll. Proper inquiry would have developed that Henry Boll owned the real estate in question at the time the judgment was entered, and that the judgment was a prior lien, and would take precedence of any mechanics' liens filed by the complainants. That they had actual knowledge of the ownership of the real estate at the commencement of the work on the buildings is shown by their very liens, which name Henry Boll as the owner.

If they failed to ascertain whether Henry Boll was the owner of the real estate at the date of entry of the judgment by the respondent, or to make proper inquiry, they cannot complain of the non-recording of the deed, and claim the proceeds of sale against a valid prior lien. They must attribute their loss to their own want of vigilance and care.

The evidence does not show that Boll furnished the respondents a list of his properties at the time of confessing the judgment in question, or that they agreed that the real estate in question, should not be covered by the lien of the judgment.

It is clearly decided in the case just cited; Moore v. Dunn, 147 Pa. 359, that in such a case as this an issue should not be directed; and this rule must be discharged.

The petition is dismissed, and the rule is discharged.

Mechanics and Workingmen's Building and Loan Association v. Boll.

Judgment—Opening of—Consideration.

Petitioner, defendant in a judgment, asked to have it opened and stricken off on the ground that it was without consideration and that there was a parol contemporaneous agreement not to enter it. The testimony showed that the petitioner, who was clerk of a building association and a director therein, agreed with other officers of the Association, to contribute to make the Association good, its affairs having become very much involved. In pursuance of this agreement the others contributed notes and stock and petitioner gave his judgment in favor of the Association, which was duly entered of record, petitioner himself writing an order to pay the costs of recording it. Subsequently the Association became insolvent and passed into the hands of a Receiver, and petitioner make an assignment for the benefit of creditors. Petitioner alleged that the agreement was that the judgment should not be recorded, but the evidence contradicted him. HELD, that the judgment will not be opened.

The four officers having agreed "to make the Association good," and the other three having fulfilled their agreement, the petitioner is bound to his engagement.

The arrangement made by the defendant with the others was a highly commendable and meritorious one to preserve the solvency of the institution, and he should not even if he could, seek to repudiate it now that disaster has befallen it and all those interested through its insolvency.

Rule to open judgment, &c.

The petition of Henry Boll, the defendant, is as follows:

The petition of Henry Boll, of the City of York, Pa., respectfully represents: That on the 29th day of August, A. D. 1894, the Mechanics and Workingmen's Building and Loan Association of York, Pennsylvania, caused a judgment to be entered in your Honorable Court to No. 194 of August Term, 1894, upon a certain bond dated the 23rd day of March, 1894, for the sum of Seventeen Thousand Dollars conditioned inter alia for the payment to said Association of the sum of $70 00, on Tuesday of each and every week thereafter until all the members of the 22nd, 23rd, 24th, 25th, 26th, 27th and 30th Series of said Association shall have received the full amount of all their shares of stock from said Association.

That the said bond was not executed and delivered by your petitioner to the said Association for any debt due by him to the said Association as a borrower therefrom, but that the said bond was executed and delivered by him simply as collateral security for the payment weekly of the said sum of $70.00 as weekly dues on two hundred shares of unredeemed stock held by him in the said Association and subscribed for by him for the purpose of assisting the said Association which was then laboring under financial embarrassment, and that he received no money or other consideration therefore; and it was further agreed that the said bond was simply to be kept with the records and papers of said Association and was not to be entered of record against your petitioner; that in accordance with the above recited condition of said bond he did, from the date of the execution and delivery thereof to or shortly

before the time when it was placed in the hands of The York Trust, Real Estate and Deposit Company as Receiver as aforesaid, regularly and faithfully pay in to the said Association the sum of $70 00, on Tuesday of each and every week during said period, and that your petitioner has in all respects faithfully complied with and performed all the terms and provisions of his said obligation during said period; that the affairs of the said Association have now passed into the hands of The York Trust, Real Estate and Deposit Company as Receiver as aforesaid, and, as your petitioner is informed and believes, all payments of money by stock holders of said Association, as holders of redeemed or unredeemed stock therein, have ceased in consequence thereof; that neither the said Association nor the said Receiver acting for it, have any further legal claim under said bond excepting as to such payments as have already been made by the said petitioner thereunder.

Your petitioner further averring, that the said bond was executed and delivered by him to the said Association without any consideration whatever, and only for the purpose of assisting the said Association in its financial embarrassment as aforesaid, and that the same was entered of record against him in violation of the aforesaid agreement, and that there is nothing now due on said judgment to the said Association or said Receiver acting for it, prays your Honorable Court to grant a rule on the said Mechanics and Workingmen's Building and Loan Association of York, Pennsylvania, the plaintiff in the said judgment and upon The York Trust, Real Estate and Deposit Company, Receiver of the said Mechanics and Workingmen's Building and Loan Association of York, Pennsylvania, to show cause why the said judgment should not be stricken from the records of said Court, or the said judgment opened and the defendant let into defence, and to grant such other and further relief as to your Honorable Court may seem just and equitable, and he will ever pray, etc.

To the rule granted on the petition the Receiver answered as follows:

The York Trust, Real Estate and Deposit Company in answer to said rule says:

That even if the allegations contained in the petition of said Henry Boll, upon which said rule was granted, were true, they are not sufficient in law or in equity to permit the Court to strike off said judgment or to open said judgment and let said defendant into a defence.

The respondent admits all the allegations contained in the first paragraph of said petition to be true.

Your respondent denies that 'said bond was not executed and delivered by your petitioner to the said Association for any debt due by him to the said Association as a borrower therefrom, but that the said bond was executed and delivered by him simply as collateral security for the payment weekly of the sum of $70.00 as weekly dues on two hundred shares of unredeemed stock held by him in the said Association and subscribed for by him for the purpose of assisting the said Association which was then laboring under financial embarrassment, and that he received no money or other consideration therefore," and demands proof of the same.

Your respondent denies that there was any agreement to simply keep said bond with the records and papers of the said Association and not to enter said bond of record against the said Henry Boll, and demands proof of the same.

Your respondent does not know whether or not the said Henry Boll paid into said Association the sum of $70.00 on Tuesday of each and every week from the date of the execution and delivery of said bond to or shortly before the time that said Association was placed in the hands of your respondent as Receiver as aforesaid, nor that the said Henry Boll complied with all the terms and provisions of said obligation during said period, as alleged in said petition, and your respondent, therefore, neither admits or denies the truth thereof, and demands proof of said statements.

Your respondent admits that payments of money by stockholders of said Association have temporarily ceased in consequence of the insolvency of said Association, but your respondent denies that it has no further claim under said bond.

Your respondent avers that said bond

was executed and delivered to the said The Mechanics and Workingmen's Building and Loan Association by the said Henry Boll for a valuable consideration, and the moneys secured by and owing on said bond are now due and owing by said Boll to said Association.

Your respondent further avers that the said Henry Boll at and before the time of the execution and delivery of said bond had borrowed from the said Association the sum of $30,685.00 on 361 shares of the capital stock of said Association, to wit: $5,100.00 on 60 shares of the 22nd Series; $9,605.00 on 113 shares of the 23rd Series; $3,400.00 on 40 shares of the 24th Series; $1,275.00 on 15 shares of the 25th Series; $1,785.00 on 21 shares of the 26th Series; $170 00 on 2 shares of the 27th Series, and $9,350 00 on 110 shares of the 30th Series, for which loans the said Association has no security nor evidence of indebtedness except the said bond for $17,000.00.

Your respondent further avers that Henry Boll never has repaid to said Association the said moneys borrowed by him from said Association, and is now indebted to said Association for said sums of money.

That all the members of the 22nd, 23rd, 24th, 25th, 26th, 27th and 30th Series of the capital stock of said Association have not received the full amount of all their shares of stock in said Association. That none of the said Series has matured.

That said The Mechanics and Workingmen's Building and Loan Association is insolvent and has been dissolved by the Court of Common Pleas of Dauphin Co., Pa. That on January 29th, A. D. 1896, The York Trust, Real Estate and Deposit Company was appointed by the said Court Receiver to take charge of the property and wind up the business and affairs of said The Mechanics and Workingmen's Building and Loan Association, of York, Penn'a.

Your respondent therefore prays the Court to discharge said rule at the costs of the petitioner.

James B. Ziegler and *A. N. Freon* for rule.

Cochran & Williams, contra.

July 5th, 1897. STEWART, J.—The defendant, Henry Boll, was a Director and Clerk in the Association plaintiff. Prior to the date of the bond, March 23, 1894, Edwin T. Moul, President; Henry Kopeman, Treasurer; George Fisher, Attorney, and the defendant met at the house of the defendant to investigate the condition of the Association. After the examination they concluded that it was necessary to do something to preserve or restore the solvency of the Association, and they agreed each to make a contribution to its assets for that purpose. Mr. Moul, in pursuance of that agreement, contributed in stock and notes about $10.000 00, by cancelling stock and notes which he held against the Association; Mr. Kopeman did the same to the amount of about $2,500.00, and Mr. Fisher to the amount of about $5.000 00. After this had been done, Mr. Boll took 110 shares of the stock of the Association in addition to 90 shares which he was then carrying, and agreed to treat both as borrowed and to give his bond for the 200 shares and pay into the Association the dues and interest on the two hundred shares until all the members in the 22nd, 23rd, 24th, 25th, 26th, 27th and 30th series should have received the full amount of their stock from the Association. His doing this was to carry out the agreement with the others. He also agreed to and did thereafter execute deeds to the Association as collateral, as he says to secure the payment of this bond. At the time he was largely indebted to the Association for money borrowed on other shares of stock for which the Association held no security. It was intended that Mr. Boll's unredeemed stock was to have been assigned as collateral for this indebtedness, but by some oversight this had not been done. So that the judgment and the property assigned did not more than cover his indebtedness.

It was averred by Mr. Boll that judgment was not to be entered on this bond, but that it was to be held by the Association among its securities. This allegation is not sustained by the evidence. The other witnesses do not support Mr. Boll in this position, and I therefore decline to strike off the judgment.

Nor is there sufficient evidence to justify opening of the judgment and letting the defendant into defence. No defence is shown, nothing but the bald allegation that it was given without any considera-

tion and this is overthrown by the testimony of the plaintiff himself. Mr. Boll testified, p. 2 of notes: "Question—Now Mr. Boll, suppose you go on and state fully as you can the circumstances attending the execution and delivery of that bond. Answer—About this time, a day or two before this was executed, myself, Mr. Moul, Mr. Kopeman and Mr. Fisher —we had talked about it a few days before —in regard to the standing of the Association. We met in my dining room and there agreed to make the Association good. After it a day or two I signed the $17,000.00 judgment. A day or two following this meeting Mr. Moul paid in the neighborhood of ten thousand dollars in shares he gave and the money he agreed to give amounted to that. Mr Fisher gave $2 500.00, a note cancelled that and took 30 shares of stock. Henry Kopeman took 30 shares of stock and gave cancelled notes to the amount of $3,000.-00, if I remember right. And after that I agreed to sign a bond and with extending the series much longer we considered our condition good and we continued on." The investigation had shown the Association short to the extent of $50,-000 00. These four officers undertook to make it good and to continue instead of going into bankruptcy. They agreed with each other for this purpose and three of them have fulfilled their agreement. This conduct on their part is sufficient to bind the defendant to his engagement; Conrad v. LaRue, 52 Mich. 83, cited in 3rd Am. & Eng. E. C. L. page 831 note 2; Prody v. Elliott et al., 181 Pa. 259.

This was in March, 1894. The judgment was entered on the bond Aug. 29th, 1894, and the deeds entered of record on the 7th of Aug., 1894, and an order was passed by the Board and written out by the defendant to pay the fees for entering and recording the judgment and deeds shortly thereafter. It is not shown that he then made any objections to the surety of the judgment ort hat he even made any objections until after the Association was again found to be insolvent and was placed in the hands of a Receiver, and the defendant himself had made an assignment for the benefit of creditors a year and a half or more after giving of the judgment, and fifteen months after its entry.

It does not seem to me that these facts present such a case as would induce a Chancellor to move in behalf of the defendant, and this is what is necessary in order to have the judgment opened; Early's App., 90 Pa. 321; Wernet's App., 91 Pa. 319; English's App., 119 Pa. 533. The arrangement made by the defendant with the others was a highly commendable and meritorious one to preserve the solvency of the institution, and he should not even if he could, seek to repudiate it now that disaster has befallen it and all those interested through its insolvency.

The rule is discharged.

First National Bank v. Colvin et al.

Judgment—Attorney—Commission—Services.

One of the defendants in this judgment presented his petition to open the judgment, &c., alleging that the debt and interest had been paid, and denying that there was due the Attorney's commission, as the real estate had been sold by the assignee, that the attorney rendered no services in the collection of the judgment, and that his claim for commission was unjust, unreasonable and illegal. To this defendant replied, setting forth a history of the attorney's connection with the judgment. HELD, that this placed upon the petitioner the burden of proving that no such services were rendered, and in the absence of such proof the rule to open judgment, &c., should be stricken off.

The real estate of the principal defendant having been sold by his assignee, and the amount realized proving insufficient, recourse was had to the other defendant for payment of the balance. There being no dispute as to the amount of the judgment nor any litigation, the Attorney's duties were not onerous, and a commission of 3½ per cent. will be a reasonable compensation.

Rule to open judgment and let defendant into a defence; and rule to strike off this rule.

The petition filed was as follows:

The petition of Joseph B. Longnecker, one of the above named defendants, respectfully represents: That judgment was entered in favor of the First National Bank and against Cyrus H. Colvin, and your petitioner as surety, upon a note containing a confession of judgment and warrant of attorney, for the sum of $3,-300.00, and with a clause providing for the payment by the defendants of an attorney's commission of five per cent. for collection, to No. —, ——— Term.

That said judgment was afterwards revived by amicable scire facias, with the same stipulation as to allowing commis-

sions, to No. 557, April Term, 1895. That said Cyrus H. Colvin, being insolvent, has therefore made an assignment for the benefit of his creditors to your petitioner, and your petitioner, in pursuance of the directions of said deed of assignment, and on order of your Honorable Court, has sold all the property, which consisted only of real estate, of said Cyrus H. Colvin, and that the sale has been confirmed absolutely by your Honorable Court, and the deed for the property delivered to the purchaser.—That the money so realized from the sale of the property of Cyrus H. Colvin was not sufficient to pay the costs attendant upon the settlement of the said assigned estate and the judgment claim described in favor of the First National Bank. That on March —, 1897, your petitioner paid to the First National Bank the sum of $3,519.19, that being the full amount of its judgment with interest, but he did not then and has not since paid anything on account of attorney's commission for collection. That on the 6th day of May, 1897, the First National Bank issued an execution upon said judgment for the purpose of collecting certain costs and the 5 per cent. attorney's commission as aforesaid. Your petitioner avers that the aforesaid judgment was not collected by the said Bank through any action on the part of their attorney. He avers that the attorney of said Bank rendered no service in the collection of said judgment, and that no execution was issued thereon, except, after payment of the judgment with interest, as aforesaid. He avers that he does not owe the said Bank anything on account of attorney's commissions, and that the claim therefore is unjust, unreasonable and illegal. Your petitioner stands ready and offers to pay the costs which accrued before the issuing of the above described execution, exclusive of attorney's commissions, as they are taxed in the proper offices.

Your petitioner therefore prays your Honorable Court to grant a rule upon the said First National Bank of York, Pa., to show cause why the said judgment should not be satisfied, and further to make an order staying all proceedings, in the meanwhile, upon said judgment and the writ of fi. fa. issued thereon, and he will ever pray, etc.

To which the bank replied:

The answer of Jacob D. Schall, President of said Bank, to the rule to show cause granted, why the above executions should not be stayed and the judgment marked satisfied, respectfully showeth:

That the said Cyrus H. Colvin, on the 19th day of June, 1890, borrowed from said bank the sum of $3,300.00 and gave his promissory note to said bank for the same, payable in sixty days, with Joseph B. Longnecker, his brother-in-law, as endorser. That the said Colvin and Longnecker on the same day executed to said bank a judgment note payable one day after date, with interest from date, for said sum, as collateral security for said loan, which judgment note was entered of record on the said 19th day of June, 1890, to No. 525, April Term, 1890. That the said judgment note stipulated for the payment of "costs of suit and attorney's commission of five per cent. for collection." On the back of said judgment note was written that it was given as collateral security for the payment of said promissory note and all renewals thereof, "and with full power to issue execution thereon and collect the same whether said promissory note is due or not." This was also signed by the defendants.

That said note was renewed from time to time for the original amount. That when the lien of said judgment was about to expire, the said bank directed its attorney, E. W. Spangler, to have the same revived. That the said attorney, instead of issuing a writ of *scire facias* and incurring costs, had the defendants appear before him, who signed an amicable *scire facias* to revive the same, with the same stipulations as in the original judgment which was entered of record to No. 557, of April Term 1895.

That the last renewal of said promissory note fell due February 24, 1896, and after notice and demand, was, on said day, protested for non-payment.

That toward the latter part of March, 1896, the said bank directed the said attorney to notify the defendants to pay said note within ten days, and, if refused, to collect by execution the said collateral judgment.

That the said attorney, as your deponent is informed by him, did send a notice by mail to that effect to said defendants towards the end of March, 1896;

that before the time given in said notice expired, the said defendants employed Jere Black, Esq , an attorney of this bar, in said matter; that Mr. Black called on the attorney for the bank, and asked him if he would permit said Colvin to make an assignment to said Longnecker for the benefit of creditors, and allow said Longnecker, as assignee, to sell the real estate of said Colvin; to which Mr. Spangler replied, that with the consent of the bank (which was afterwards obtained) he would consent, provided his attorney's commissions in said judgment would be paid and not be contested, as he could make them in a short time by the sale of the real estate of the defendants by execution; to which Mr. Black replied, that that was all right, that the commissions would not be disputed; that in consequence the assignment was made, March 31, 1896, and an application to the Court drawn up for the sale of the said real estate, which Mr. Spangler signed as attorney for said bank when the conversation as to the attorney's commissions was renewed; that after said order of sale was granted, a number of conferences were held between the attorneys in relation to the sale of the assignor's real estate, time of sale, and the payment of the purchase money; that Mr. Black notified Mr. Spangler of the time of sale, and the latter had one of the directors of said bank attend said sale in the interest of the bank.

That in March, 1897, Mr. Spangler furnished Mr. Black a calculation of the amount due on said judgment, with attorney's commissions, and docket costs, amounting to $3,702.39, and to which no objection was made.

That on the 31st day of March, the assignee and his counsel came to the office of Mr. Spangler and stated that they hadn't enough money to pay the entire claim as presented. Mr. Spangler asked them how much they had, and upon finding that they had nearly enough to pay the principal, interest and protest fees due on the note, amounting to $3,519.49, asked them to raise enough to pay the same, and that he would wait a few days for the attorney's commissions and docket costs. To which they replied that they would raise the said sum of $3,519 49, and that they would pay Mr. Spangler the attorney's commissions the week following, when they would file the assignee's account. To this Mr. Spangler assented. The amount of $3,519.49 was raised and brought by Mr. Black and the assignee to Mr. Spangler's office for payment. Mr. Spangler drew up a refunding receipt and asked them, as he was busy, to pay the amount direct to the bank, and have the receipt signed by the Cashier, all of which was done, and the promissory note. but not the judgment note or certificate, delivered to them.

That Mr. Spangler waited for more than two weeks thereafter for the payment of the attorney's commissions and docket costs. He then called on Mr. Black to know the reason for the delay. Mr. Black then showed him a letter that he had just received from the assignee, in which the assignee stated that he would not pay more than five or ten dollars of the attorney's commissions; upon reminding Mr. Black of his, and the assignee's, promises in regard to the attorney's commissions, and also that he was legally entitled to the same, Mr. Black said he would write to the assignee to come to see him.

On the 6th day of May, 1897, Mr. Black and the assignee came to the office of Mr. Spangler. Mr. Longnecker stated that he had seen Jacob D. Schall, the President of said bank, and that he had told him that the bank had received its principal and the interest due on the note, and had no further interest in the matter. Upon the suggestion of Mr. Spangler, all the parties repaired to the Director's room of the bank, where were present Jacob D. Schall, Charles M. Billmeyer, and a few others moving in and out of the room. Mr. Schall then and there stated that he did state that the bank had received its principal and interest, but that if the judgment note contained attorney's commissions, Mr. Spangler was entitled to them. That upon the refusal then by said assignee, through his attorney, to pay said attorney's commissions, execution was issued on said judgment of $3,300.00, with interest from February 24, 1896, to April 1, 1897, with attorney's commissions of five per cent. and

costs, less a credit of $3,519.49, of March 31, 1897.

That said attorney's commissions are claimed by said bank for the purpose of paying their said attorney for the collection of, and his services in, the same.

That it is not true, as alleged in the petition on which this rule was granted, "that the aforesaid judgment was not collected by the said bank through any action on the part of their attorney * *" and "that the attorney of said bank rendered no service in the collection of said judgment," and "that he does not owe the said bank anything on account of attorney's commissions, and that the claim therefore is unjust, unreasonable and illegal."

Your deponent therefore prays your honorable Court to dismiss said petition and discharge the rule granted, with the said bank's reasonable costs in that behalf expended.

Jere S. Black for rule to open.

E. W. Spangler, contra.

July 5th, 1897. STEWART, J.—This matter might be disposed of by making absolute the rule to strike off, and as indicating the Court's view of the proper practice this ought to be done. The petition of the defendant alleges that the judgment debt and interest has been paid and admits that neither costs nor attorney's commissions have been paid. It avers a readiness andwillingness to pay the costs and alleges that the debt and interest were not collected by the plaintiff through any action on the part of the attorney, and that the attorney rendered no service in the collection of said judgment, and that the claim for attorney's commissions is unjust, unreasonable and illegal. These allegations are specifically denied in terms by the answer, which in addition to so denying goes into a history of the attorney's connection with said judgment and its collections This was sufficient to put upon the defendant the burden of proving that no such services were rendered, and the replication filed by the defendant does not change this burden. The replication denies in part the allegations of the answer, but the denial is largely argumentative and somewhat astute. Although it is in form negative, it is of the negative pregnant, admitting the attorney's action as counsel in reference to the judgment and finally expressing a willingness to pay such a sum as will be a reasonable compensation for the attorney for the services rendered to the bank.

This being the case, I will discharge the rule to strike off and consider the matter as heard on bill and answer.

The amount of the judgment, debt and interest was $3,519.49 and the rate of commission agreed upon is five per cent. The real estate bound by the lien of the judgment, after an assignment for the benefit of creditors, was sold, and this was the only property available for the payment of the same, and this was not sufficient to pay the costs of settling the assigned estate and the judgment, so that Joseph B. Longnecker, the security on the judgment and the petitioner for this rule, must make good the shortage.—There was no dispute as to the amount of the judgment or any litigation in reference thereto, so that the duties of the attorney of the bank in the matter were not onerous. I am inclined to think that 3½ per cent. under the circumstances would be a fair and reasonable compensation, and therefore I fix the amount of compensation at $123.18, being 3½ per cent. on the amount of debt and interest paid, and direct that if the same, together with the costs as taxed by the Prothonotary, be not paid on or before July 12, 1897, the rule shall be discharged; and upon payment of this amount, together with costs as stated, on or before that date, the judgment shall be marked satisfied by the Prothonotary.

McGuigan v. Boll et al.

Equity—Resulting trust—Creditors.

Plaintiff, by her deed, conveyed real estate to defendant in fee, which deed was at once recorded. By a contemporaneous parol and written agreement it was understood that defendant was only to pay for the real estate as it was sold by him. Defendant having made an assignment for the benefit of creditors, this bill was filed to decree said conveyance void and have the real estate re-conveyed to plaintiff. On demurrer filed by creditors of the defendant, HELD, that the demurrer will be overruled.

The judgment creditors of defendant have no rights in the land superior to his, not being purchasers.

Where land is conveyed for a consideration which is to be afterwards ascertained by the price at which the grantee may sell it, there arises a resulting trust to the grantor until the

sale is made and the grantee becomes a trustee subject to all the equitable rules which would have bound him had the deed in express terms empowered him to sell for the use of the grantor.

Demurrer.

Plaintiff's bill was as follows:

On January 17th, 1893, James H. Schall, of the City of York, conveyed unto the plaintiff by deed duly executed and recorded "all the following described piece of ground situated in Spring Garden Township, York County, State of Pennsylvania. Bounded and described as follows:—(Here follows description.)

The consideration of One Thousand Eight Hundred Dollars ($1,800) recited in said deed was the sole and separate estate and property of the plaintiff and the said land so conveyed was and is the sole and separate property of the plaintiff.

On May 2nd, 1895, Henry Boll, one of the said Defendants, procured the execution by the Plaintiff and her husband, John McGuigan, of a deed of the said land to him.

No consideration whatever was paid by or passed from said Henry Boll for said deed. Plaintiff desired said Boll to sell the said land for her and he suggested that she execute the said deed in order to facilitate such sale. At the time of the execution and delivery of said deed by plaintiff and her husband, said Henry Boll executed an agreement dated said 2nd day of May, 1895, as follows:

This agreement, made the second day of May in the year of our Lord one thousand eight hundred and ninety-five.

Between Sarah M. McGuigan of the City of York, County of York, and State of Pennsylvania of the one part, and Henry Boll of the City of York, County and State aforesaid of the other part. Witnesseth, that the said party of the first part has this day delivered to the said party of the second part, a deed of nine lots on Chestnut St. extended, and the consideration therein mentioned is nine hundred dollars, ($900.)

And whereas it is hereby expressly agreed between the said Sarah M. McGuigan of the one part and Henry Boll of the other part, that in no wise the said sum of nine hundred dollars or any part thereof shall be paid to the said Sarah M. McGuigan until the said Henry Boll shall make sale of one or more, or all of said lots, then in such case, the same shall be paid to the said Sarah McGuigan.

And further, it is also hereby expressly nuderstood and agreed between the said Sarah M. McGuigan of the one part and Henry Boll of the other part, that should the sale of all of said lots mentioned in said deed, be sold for any amount less the consideration therein set forth, then in no wise the said Henry Boll shall be held responsible for such loss, but on the contrary should the said lots be sold for an amount exceeding nine hundred dollars, then the said Henry Boll shall pay the same to the said Sarah M. McGuigan without further delay.

Witness the hands and seals of the parties herein mentioned the day and year first above written.

Witness:

(Signed) WILLIAM H. BOLL.

(Signed) SARAH M. MCGUIGAN. [seal]

(Signed) HENRY BOLL. [seal]

It was the understanding and agreement at the time of the execution of said deed that the said Boll should have no right, title or interest of his own in said land; but should hold the title thereto simply as trustee for plaintiff, and in order to enable him with greater ease to bring about a sale thereof for her. Said Boll never exercised any acts of ownership or possession over the said property but the same has been continuously since the said deed from James H. Schall and is now, in the exclusive possession and control of the plaintiff.

On January 17th, 1896, said Henry Boll and Mary, his wife executed and delivered unto Henry W. Heffner and William A. Mitzel a deed of assignment for the benefit of creditors of said Henry Boll, which was recorded in the Recorder's office of York County in Deed Book "10 P," page 188.

The Defendants, Heffner and Mitzel, as assignees of the said Defendant Boll, have offered the said land of the Plaintiff for sale and threaten and announce that they will again offer and sell the same as property of said Henry Boll.

The defendants other than the said Henry Boll and his said assignees are holders of judgments entered in the said Court of Common Pleas of York County, Pa., between the date of the said deed from Plaintiff and her husband to Henry

Boll and the date of the said deed of assignment from said Boll and wife to said Heffner and Mitzel.

Wherefore plaintiff needs equitable relief and prays:

1st. That the said deed of May 2nd, 1895, recorded in Deed Book "10 J" page 201, be decreed void and of no effect.

2nd. That defendants Henry Boll, Henry W. Heffener and Wm. A. Mitzel be decreed to execute a reconveyance of the real estate described therein to the plaintiff.

3rd. That said defendants Henry Heffener and William A. Mitzel be enjoined from executing any transfer or conveyance to any other person of any of the land described in said deed.

4th. General relief.

To this bill the following demurrer was filed by some of the judgment creditors of Henry Boll:

First. Because the bill fails to set forth or contain a state of facts which entitle the plaintiff either to the relief for which he prays or to any relief in equity.

Second. That the bill is contradictory in its terms, in that the parol agreement alleged to have been made shows one contract, and the written exhibits another entirely at variance therewith and therefore plaintiff is not entitled to any relief in equity.

Third. That the parol agreement alleged in said bill to have been made between the plaintiff and said Henry Boll, is in direct contradiction of the deed and written agreement made at the same time between the same parties for the same subject matter, and as the two cannot stand together the written instruments must be regarded as showing the true intent and act of the parties at the time and under such written instruments plaintiff is not entitled to any relief.

Fourth. Because the alleged agreement between the said plaintiff and her husband and Henry Boll, dated May 2nd, 1895, referred to in paragraph four of said bill and called "Exhibit B" and as such printed as an appendix to said bill, shows on its face that it related to the time and manner of paying for the lots of ground therein mentioned, and did not create nor attempt to create any trust in Henry Boll, or in any way affect the absolute indefeasible title in said real estate granted and conveyed to him and his assigns by said deed.

Fifth. Because by the execution and delivery by Sarah McGuigan to the said Henry Boll, of the said deed for said lots of ground on May 2nd, 1895, she thereby enabled the said Boll to have the said deed recorded in the office for the recording of deeds in and for said county, and the said Boll at once, to wit: on the 4th day of May, 1895, entered the said deed for record, and said deed was a conveyance of said lot of ground to said Boll absolutely and in fee simple, by reason whereof the credit of the said Henry Boll was increased and the said B. J. Jing, Edward Reineberg, C. F. Keech, John Gallagher and John W. Plonk, afterwards either endorsed or continued to endorse the notes of the said Henry Boll or became surety or continued surety for him and the said The Anchor Building and Loan Association loaned money to the said Henry Boll by reason of his so increased credit, and therefore even if all the facts averred in the said plaintiff's bill are true, the plaintiff who occasioned the loss by her own act is not entitled to the relief for which she prays, as against and to the loss of these innocent defendants.

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendants pray judgment of this Honorable Court whether they shall be compelled to make any other answer thereto; and these defendants pray to be hence dismissed with their reasonable costs in this case sustained.

Cochran & Williams, S. C. Frey and *W. A. Miller* for demurrer.

Niles & Neff, contra.

July 5th, 1897. STEWART, J.—The bill in this case alleges that the plaintiff was on May 2, 1895, the owner of certain lots in fee which she desired to have the defendant sell for her; that they cost her $1,800.00, and that to facilitate the sale, the defendant Boll procured the plaintiff and her husband to execute and deliver to him a deed in fee for these lots, the consideration in which deed was $900.00, which deed he had recorded two days after its execution. That at the same time she and the defendant Boll entered into a written agreement in reference to the sale of said lots, the operative portions of which are as follows:—"This

agreement * * * witnesseth that the said party of the first part has this day delivered to the said party of the second part, a deed for nine lots on Chestnut St. extended, and the consideration therein mentioned is nine hundred dollars ($900.) And whereas it is hereby expressly agreed between the said Sarah M. McGuigan of the one part and Henry Boll of the other part, that in no wise the said sum of nine hundred dollars or any part thereof shall be paid to the said Sarah M. McGuigan until the said Henry Boll shall make sale of one or more, or all of said lots, then in such case, the same shall be paid to the said Sarah McGuigan.

And further, it is also hereby expressly understood and agreed between the said Sarah M. McGuigan of the one part and Henry Boll of the other part, that should the sale of all of said lots mentioned in said deed, be sold for any amount less the consideration therein set forth, then in no wise the said Henry Boll shall be held responsible for such loss, but on the contrary should the said lots be sold for an amount exceeding nine hundred dollars, then the said Henry Boll shall pay the same to the said Sarah M. McGuigan without further delay."

It will be observed that no part of the consideration of $900.00 is to be paid until the said Henry Boll shall make sale of one or more or all of said lots; then in such case the same shall be paid to said Sarah McGuigan, and it is further provided that if the lots are sold for less than $900, Boll shall not be liable for the loss, and if they should be sold for more, the whole amount shall be paid to the complainant without further delay.

It is alleged in the bill and admitted by the demurrer, and confirmed by this agreement that none of the purchase money was paid. It is further alleged that it was the understanding and agreement at the time of the execution of said deed that said Boll should have no right, title or interest of his own in said land but should hold simply as trustee for the plaintiff and in order to enable him with greater ease to bring about a sale thereof for complainant. That said Boll never exercised any acts of ownership or possession over said property, but that the same remained and still is in the complainant. These allegations are of course admitted by the demurrer.

The respondents are Henry Boll, the grantee, his assignees in trust for the benefit of his creditors and his judgment creditors. These of course have no rights in the land superior to those of the grantee, not being purchasers; Garrison's App., 2 Gr. 216; Cover v. Buack, 1 Pa. 493; Reed's App., 13 Pa. 475; Morris v. Ziegler, 71 Pa. 450.

I think a fair construction of the contemporaneous written agreement is that Boll was to act as the trustee to sell the land and collect and pay the proceeds to the complainant, and that the deed to him was made to accomplish this purpose only, and so far as appears from the agreement he had no equity in the property or its proceeds even to the extent of his commissions if any were to be paid, which does not appear. "Where land is conveyed for a consideration which is to be afterwards ascertained by the price at which the grantee may sell it, there arises a resulting teust to the grantor until the sale is made and the grantee becomes a trustee subject to all the equitable rules which would have bound him had the deed in express terms empowered him to sell for the use of the grantor;" Brightly's Eq. Sec. 411; Provost v. Gratz 1 P. C. C. 367; 2 Story's Equity, Sec. 1197.

But independent of any agreement on his part to hold as trustee the nature of the transaction clothes him with that character and equity will hold him to the execution of the duties of a trustee in reference to the property; Brightly's Eq., Sec. 414; Lynch v. Cox, 11 Leg. Int. 166.

The demurrer is therefore overruled and the respondents directed to answer within twenty days; in default of an answer a decree *pro confesso* will be entered against them, or against such as do not answer.

SUPREME COURT.

Gallagher's Appeal.

County Commissioners—Soldiers' Monument—"Building."

Two of the County Commissioners entered into a contract with a contractor for the erection of a soldiers' monument to be paid by the County, without having invited or received any

competitive bids, without any inquiry from others as to the probable cost of such monument, without submitting the plan to the Court for approval, and without making any provision for levying a tax to pay for the same. An injunction was applied for and it was made permanent. HELD, to have been error.

A monument is not a "building" within the meaning of the Act of April 19, 1895, P. L. 38. A statue on a pedestal, even though the latter be large, is not a building in the proper meaning of the term.

The assessed valuation of the property taxable for county purposes was $42,856,430; at the time the contract was signed there was in the Treasury an aggregate of $55,000, against which were liabilities of $49,000. HELD, reversing the court below, that the Commissioners had a right to contract for a monument costing $23,500.00.

Appeal from the decree of the Court of Common Pleas of York County, Pa.

The bill filed by the plaintiffs and the opinion of the Court below, will be found in Spangler et al. v. Leitheiser et al., 10 YORK LEGAL RECORD, 121.

From the decree there entered, Edward Gallagher, the contractor, took this appeal.

Jere S. Black, John W. Heller and *B. F. Fisher* for appellant.

Niles & Neff and *Latimer & Schmidt* for appellees.

July 12th, 1897. STERETT. C. J.—The tax-payers' bill was brought to restrain the execution of a contract between appellant and the County Commissioners for the erection of a monument under the act of May 22, 1895, which provides: "That upon petition of at least fifty citizens to the Court of Quarter Sessions of any county * * * for the erection or completion of a monument in memory of the soldiers and sailors of the late war it shall be the duty of said court to lay the petition before the Grand Jury, and, if approved by two successive grand juries and said court, the County Commissioners shall be authorized to erect, or complete any monument now partly erected, but not completely, and maintain at the county seat a suitable monument in memory of the soldiers and sailors of the late war of the rebellion from said county," P. L. 96.

All the conditions precedent to official action of the County Commissioners, such as presentation of the petition, approval thereof by two successive grand juries and the Court, etc., were fully complied with before the contract was made. For reasons which sufficiently appear in the opinion of the learned president of the court below a preliminary injunction was granted and by subsequent decree continued until final hearing. From that decree this appeal was taken by one of the defendants, Edward Gallagher, whose contention is that no sufficient ground for such injunction was shown.

One of the reasons assigned by the court below in support of its decree is that the contract in question is invalid for want of compliance with the act of April 19, 1895, P. L. 38, requiring County Commissioners in the erection of a Court House, jail or other County building to let the work to the lowest and best bidder. This conclusion was made possible only by the learned judge's assumption that the proposed monument is or will be a "county building" within the Act. In that he was clearly mistaken. The provisions of the Act have no application to the structures such as that under consideration. In the Society of Cincinnati's Appeal, 154 Pa. 621, the meaning of the word "building" in clause of the Act March 11, 1816, prohibiting the erection "of any sort of buildings on part of Independence Square," was considered by this Court, and in an opinion by our brother Mitchel it was held that the Washington monument finally located in Fairmount Park and recently dedicated with imposing ceremonies, was not a building within the meaning of said prohibitory clause. It was there said the proposed monument is not a building within the prohibited condition. A monument may take the shape of a Memorial Hall or other building, but that is not the general use of the word and will not be presumed. A statue on a pedestal even though the latter be large, is not a building in the proper meaning of the term. This construction of the word "building" is not only reasonable, but in full accord with the general understanding; and, in the absence of a clearly defined intention to the contrary, it should be given controlling effect in the interpretation of the legislative will. No such contrary intent is apparent here and we therefore think the Court below erred in holding that the Act of April 19, 1895, has any application to the facts of this case.

Another reason given by the learned judge of the Common Pleas is that the contract was made in violation of Sections 8 and 10 of Article IX of the Constitution and the law regulating the mode of increasing municipal indebtedness. We find nothing in the record that warrants any such conclusion as this. The undisputed evidence shows that the total aggregate valuation of property taxable for county purposes for the years 1896 and 1897 was $42,856,430. On December 21, 1896, when the contract was signed, there was in the County Treasury approximately $12,000 cash, $30,000 due from the State Treasurer and $13,000 overdue taxes. As against this there were outstanding bonds $6,000, a bridge contract balance about $40,000 and for office furnishings $3,000. The contract price of the monument was $23,550. These items in the aggregate are much less than the percentum authorized by the Constitution. Two percentum on the assessed valuation would be $857,308.62. The evidence further shows that the annual revenues of the county from assessments made for county purposes, together with the sum received annually from the State Treasurer as the county's proportion of taxes collected, etc., would aggregate at least $200,000 for the year 1897. The taxes levied by the Commissioners for that year with the cash on hand and the amounts due were very largely in excess of the county's liabilities, including the contract price of the monument. The only conclusion that can be fairly drawn from the evidence before us is that the contract in question does not in any manner come in conflict with the constitutional provisions, above referred to, or those of the Act of 1874; Reating et al. v. Titusville, 175 Pa. 512; Wade et al. v. Oakmount Boro., 165 Pa. 479; City of Erie's Appeal, 91 Pa. 398.

Further elaboration of the question suggested by the Court below is neither necessary nor desirable. It is sufficient to say, that the case, as presented to us, discloses no sufficient ground either for granting or continuing the injunction. It is virtually admitted by the Court below that the allegations of fraud were not proved. It is scarcely necessary to say that proof of suspicious circumstances,—if any there be,—is not enough.

The decree continuing the injunction is reversed and set aside and the preliminary injunction dissolved; and it is ordered, adjudged and decreed that the costs including the costs of this appeal be paid by the plaintiffs.

Wilhelm's Estate.

Distribution—Judgment—Collateral.

W. gave to C., as collateral for payment of his promissory note in C.'s favor, certain stocks and a judgment note, the latter alone being for the full amount of the debt. Subsequently he made an assignment of all his estate to C., for the benefit of his creditors. In pursuance of a power given to it at the time of giving the collateral, C. sold the stock. Afterwards, under an order of Court, it sold the real estate. The auditor distributing the balance on the assignee's account, allowed interest on C.'s judgment to the date of distribution, which report was confirmed by the Court below. HELD, to have been error.

C. held the stock not as assignee but as pledgee, and sold it as such. Having converted the stock into money it could not hold the money as collateral and allow interest to run on the note. The power to sell was that it might pay the note, and when it was sold and received the money its claim to that extent was extinguished.

The real estate of the assignor was sold under an order of court, and the sale confirmed September 15th, 1895. There was no contention or dispute as to the order of the liens or the validity of C.'s judgment. On the distribution, the auditor awarded interest on its judgment to the date of distribution, and the Court below confirmed the report. HELD, to have been error.

C. held the proceeds of the sale of the real estate in trust first, for the lien creditors in the order of priority of their liens. The creditors whose liens were discharged were required to look to the fund and interest on their claims ceased on the date of the confirmation of the sale. C. being one of these creditors, received the money for its own use, and as a trustee for all of the creditors it was required in their interest to apply it to the discharge of its debt at once.

Appeal from the decree of the Court of Common Pleas of York County, Pa.

The report of the auditor, R. J. Lewis, Esq., was as follows:

The balance on account as lessened by the costs of settling the exceptions filed to said account is $25,099.39, which sum is increased to $25,332.05 by a surcharge of $232.66, the balance on the supplemental account presented to your auditor, as appears by reference thereto. Of said latter sum $104.01 are the net proceeds of the sale of realty situate in Cambria

county, upon which a judgment held by the said The Commonwealth Guarantee, Trust and Safe Deposit Company was the only lien, and to which therefore said sum is awarded and the remainder of said amount, the sum of $128 65 was realized out of Nebraska real estate and is distributed by your auditor as personalty.

The account blends the proceeds of personalty and realty, and of said balance for distribution your auditor determines that $24.494.74 are the proceeds of realty, and $837.31 the proceeds of the personalty and of realty properly distributable as personalty. From these amounts are deducted costs of audit amounting to $91,86 and $100, which latter sum is awarded to Niles & Neff "for necessary legal services rendered accountant before the auditor, and in regard to the questions of exception." Objection was made to any allowance for such services by the attorneys for the Misses Wilhelm, but your auditor having sat in the settlement of the exceptions, and having a knowledge of the time, labor and skill employed in successfully defending the account from the attack made upon it. considers it a just claim.

Of said costs of audit and said award $42.31 are deducted from the personalty fund leaving the sum for general distribution $795, and the balance $149 55 is deducted from the realty fund, leaving the sum for distribution among the lien creditors $24 345.19 Said personalty fund is distributed *pro rata* (the dividend being .018408) among all the creditors.

Out of the realty fund ($24,345.19) for distribution, the sum of $4,048.06 is awarded to the Commonwealth Guarantee, Trust and Safe Deposit Company (on Judgment No. 1,) it having taken an assignment of the judgment entered by the Jonestown Bank of Jonestown, Pa., and Lebanon National Bank of Lebanon, Pa., in the Prothonotary's Office of Dauphin County, Pa., in the sum of $3,500, and having paid therefor September 18, 1893, after execution had issued thereon, the sum of $3,748.56. The amount of said award involves interest on said sum of $3,748.56 from September 18th, 1893, to the date of the absolute confirmation September 5th, 1895.

Claim No. 2, of said Trust Company is based upon a $15,000 note, bearing date March 13, 1893, payable to the order of said Trust Company upon demand, as collateral security for the payment of which, as well as for the payment of two other notes held by said Trust Company, which have been paid in full, certain stocks were assigned to the Company, of the proceeds of the sale of which $1,662.08 are applicable to the payment thereof and as additional collateral security a judgment bond was given by assignor bearing date December 7th, 1892, upon this bond containing a stipulation for the payment of an attorney's fee of five per cent., judgment was entered to No. 513, September Term, 1893, in Dauphin Co., and judgment thereon; also entered in York Lebanon and Cambria Counties, which judgments constituted the second lien upon assignor's realty.

Counsel for the Trust company contended that in determining the amount to be awarded out of the realty fund interest should be calculated on the judgment from the date of the bond, to wit, December 7th, 1892, and that the attorneys's fee of five per cent. should be allowed together with $7 40 prothonotaries' costs; the attorneys for judgments 3, 4 and 5, however, maintained that the interest should be calculated upon said note dated March 13th, 1893, and should be calculated from May 1, 1894 the date to which interest on said note was admitted to have been paid in the petition for the order to sell the real estate, and objection was made to the allowance of an attorney's commission on the ground that "no service had been rendered by the counsel in the judgment to the plaintiff in the way of the collection of the money, and that no execution had been issued."

Your auditor believing the plaintiff in the judgment entitled to a commission because of the necessity for, and the employment of an attorney to perform the services in the collection of its claim of the character mentioned, to wit, "appearance to such judgment, the attorney representing the judgment at the time of the application for an order to sell * * * and before the auditor, by Bittenger, J., in Schue's Assigned Estate 6 YORK LEGAL RECORD, page 16 as sufficient to authorize an award, awards a collection fee of two per cent. upon the sum awarded upon this claim out of the realty; Warwick Iron Co. v. Morton, 148 Pa. 72.

Your auditor finds the note bearing date March 13, 1893, the proper instrument upon which to calculate interest, and that interest thereon has been paid to May 1st, 1894, therefore $15,000 00, with interest thereon from said date, May 1st, 1894, to March 15th, 1897, to wit, the sum of $17.585, together with said collection fee of two per cent., the sum of $309.90 and Prothonotary's costs $7.40 amounting in all to $17,902.30 is the present amount of the claim, and $15,000 with interest from May 1, 1894, to September 5, 1895, to wit, the sum of $16,210, the amount of the realty fund applicable to the payment thereof, but as $104 01 proceeds of sale of Cambria County realty and $323.71, out of the personalty fund have already been awarded and $1,662.08 as aforesaid are properly applicable to the payment of this claim only such sum is awarded out of the realty fund as with said awards of $104.01 and $323.71, and the application of said $1,662.08 will constitute full payment, to wit, the sum of $15,812.50, which is accordingly done.

The balance of the realty fund, the sum of $4,380 62, is distributed *pro rata* upon the judgments held by the said Sarah H. C. Wilhelm, the judgment held by Isabel S. Wilhelm and the judgment held by them jointly, hence to the said Sarah H. C. Wilhelm is awarded the sum of $1,189.61, to Isabel S. Wilhelm the sum of $1,323 01, and to the said Sarah H. C. Wilhelm and Isabel S. Wilhelm jointly the sum of $1,868.

Council for the Wilhelms filed the following exceptions:

1. The auditor should have stated clearly and concisely the questions of law and fact and his findings thereon respectively and his reasons therefore, under the Rules of Court.

2. The auditor erred in his distribution of the proceeds of realty, in calculating interest on the judgment of the Commonwealth Guarantee, Trust and Safe Deposit Company, No. 513, September Term, 1893, in the Court of Common Pleas of Dauphin County, (also entered in York and Lebanon Counties) and on the note to which it was collateral, up to March 17th, 1897, the date of the distribution.

3. The auditor erred in awarding the sum of $15,812.50 to the Commonwealth Guarantee, Trust and Safe Deposit Co. on its above named judgment out of the proceeds of realty, and said amount being largely in excess of the balance due on said judgment and of the note it was given to secure.

4. The auditor should have calculated interest on the $15,000 note, dated March 13th, 1893 (to which the judgment note of the same date and amount was given as collateral) from May 1st, 1894, to May 10th, 1895, the date at which the assignee's account shows that the pledgee sold the stock collateral held for the same and other indebtedness, or at latest to June 5th, 1895, when the pledgee asserted it had realized the proceeds of sale. He should have deducted as of that date the $1,662.08, balance of proceeds of stock collateral remaining in the hands of the pledgee after paying the other indebtedness; and should have calculated the interest on the balance up to September 5, 1895, the date of the final confirmation of the sale of the realty, by which the lien of the $15,000 judgment was divested

5. The proper mode of calculation in distributing the real estate proceeds would have been, after awarding the amount of the Lebanon Bank assigned judgment, as follows:

Principal of note to which the $15,000 judgment was collateral	$15,000 00
Interest from May 1, '94 to May 10, '95, date of sale of collateral	900 00
	15,900.00
Deduct balance of stock collateral in the hands of pledgee who was assignee	1,662.08
	14,237 92
Add interest on balance to September 5, '95, date of confirmation of sale of realty	213 57
	$14,451.49
Or, assuming June 5, '95, as the date when the pledgee realized on the collateral:	
Principal of note	$15,000.00

Interest May 1, '94 to June 5, '95	975.00
	15,975.00
Deduct balance of stock collateral in the hands of pledgee who was also assignee	1,662.08
Balance then unpaid	14,312.23
Interest on balance to Sep. 5, '95, date of confirmation of sale of realty	214 69
	$14,527.61

which should have been awarded to the Commonwealth Guarantee, Trust and Safe Deposit Company in full of its judgment, No. 215 September Term, 1893, out of realty, and balance of the proceeds of realty awarded to the judgments of Isabel S. Wilhelm and Sarah H. C. Wilhelm, which were the next and only liens on the realty.

6. The auditor erred in his awards to the last mentioned judgments which were entitled to awards largely in excess of the amounts awarded.

7. The auditor should have awarded to the judgments of Isabel S. Wilhelm and Sarah H. C. Wilhelm, entered in the court of Common Pleas of Dauphin Co., to Numbers 522, 523 and 524 of September Term, 1893, (also entered in the Courts of Common Pleas of York and Lebanon counties) which were the next liens on the real estate after the Commonwealth Guarantee Trust and Safe Deposit Company's judgment, the balance of the proceeds of realty, to wit, $5,769.51, by the first above calculation, or $5,845.64, by the second above calculation, as follows:

Total proceeds of realty distributed by the auditor	$24,345.19
To assigned judgment of Lebanon National Bank	4,048 06
	20,297.13
Award to Trust Company on its above mentioned judgment	14,451.49
Balance to be awarded to the Wilhelm judgments	5,845.64
Or adopting second calculation	5,769.51

out of the proceeds of realty, instead of the sum of $4,380.62, as by the amount actually awarded by him *pro rata* among said judgments.

8. The auditor erred in allowing any attorney commissions on judgment No. 513 September Term, 1893, in favor of the Commonwealth Guarantee Trust and Safe Deposit Company.

9. The auditor erred in awarding a dividend out of the proceeds of the personalty to the Commonwealth Guarantee, Trust and Safe Deposit Company on judgment, No. 513 September Term, 1893, aforesaid, because a correct calculation would have shown that that judgment was paid in full out of the realty. The auditor also erred in awarding a dividend out of the proceeds of the personalty to same Company, plaintiff in judgment entered to No. 517, September Term, 1893, in Lebanon county (also entered to No. 517, September Term, 1893, in Dauphin County,) that judgment having also been paid out of the proceeds of the sale of the realty. If said judgments are entitled to any dividend out of personalty the amount should equitably be deducted from their dividends out of realty since those judgments are not entitled to be paid more than the total amount due thereon.

The Court below, Stewart, J., filed the following opinion:

J. Schall Wilhelm assigned for the benefit of creditors on the 11th day of September, 1893. At the date of the assignment he was the owner of real estate in Dauphin, Lebanon, York and Cambria Counties, Pennsylvania, and in the State of Nebraska.

Prior to the assignment judgments had been entered against him as follows:

Lebanon National Bank and Johnstown National Bank for the use of the Commonwealth Guarantee, Trust and Safe Deposit Company vs. J. Schall Wilhelm. No. 20, September Term, 1893, in Lebanon county, entered in 1893; No. 510, September Term, 1893, in Dauphin county, entered August 30, 1893, for $3,500.00.

This judgment was the first lien on the defendant's real estate in Lebanon and Dauphin counties.

Commonwealth Guarantee, Trust and Safe Deposit Company vs. J. Schall Wilhelm. No. 513, September Term, 1893, entered August 31, 1893, for $15,000.00

and as shown by the record with interest from December 7, 1892.

This judgment was the second lien in Dauphin and Lebanon counties; and the first in York and Cambria counties.

Isabel S. Wilhelm vs. J. Schall Wilhelm. No. 522, September Term, 1893, in Dauphin and also entered in York and Lebanon counties.

Sarah H. C. Wilhelm vs. J. Schall Wilhelm. No. 523, September Term, 1893, and also entered in York and Lebanon counties.

Isabel and Sarah H. C. Wilhelm's use vs. J. Schall Wilhelm. No. 524, September Term, 1893, and also entered in York and Lebanon counties.

The three last judgments were entered contemporaneously in the three counties, Dauphin, York and Lebanon, and constituted the third lien on the real estate, which was sold under an order of Court and the sale confirmed September 5, 1895.

The principal controversy arises between these last three judgments and the second of the Commonwealth Trust Company immediately preceding them. This company had loaned to J. Schall Wilhelm money on certain notes and had received collaterals therefor among which were the collaterals hereinafter mentioned.

On March 13, 1893, J. Schall Wilhelm gave to the Commonwealth Trust Comp any his certain other collateral note dated that day, agreeing to pay on demand $15,000 and in said note recited that he deposited therewith judgment bond for $15,000: 45 shares Central Iron Works and 155 shares Charles L. Bailey Co., Inc. These are the same collaterals which he had previously pledged and the bond referred to in this collateral note is the bond of December 7, 1892, on which said second judgment was entered. It is to the amount of interest computed on this judgment that the principal exceptions are filed, and upon which the main contention is based.

After the assignment, which was made to the Commonwealth Guarantee, Trust and Safe Deposit Company, the holder and pledgee of the collaterals, it sold them as pledgee and after paying the notes for which they were originally held there remained in its hands the sum of $1,662.08. The exceptant contends that as the pledgee held these collaterals for the same debt as that for which the judgment bond was given, it should have immediately applied this sum of money in liquidation of that debt to stop interest and in relief of the lien on the real estate. See 4th and 5th exceptions.

It is also contended that the auditor erred in his computation of interest (2nd exception) on the judgment bond. The auditor computed the interest on the note for which the bond was given as collateral from May 1st, 1894, the date to which interest had been paid, to March 15th, 1897, the day of the distribution, to ascertain the amount of debt and interest then due thereon; he then computed interest on the $15,000 judgment from May 1st, 1894, the same date as the note to which it stood as collateral, to September 5, 1895, the day of the final confirmation of the sale of the assignor's real estate, for the purpose of ascertaining its value as collateral, and the amount was found to be $16,210; this was a correct computation and not open to the objection made in the second exception.

The Trust company's claim then stood thus:

Amount of debt, interest and attorney's commissions 2 per cent. on the note and record costs		$17,902.30
To pay which it had:		
Amount of real estate collateral	$16,210.00	
Amount of stock collateral	1,662.08	
Amount realized from Cambria County estate	104.01	
Amount realized dividend of personal estate	323.71	
	$18,299.80	
Deduct amount of its claim	17,902.30	
	$397.50	

Thus it will be seen that the collateral held and the dividends awarded exceeded the amount of its claim by $397.50. Of course it was only awarded sufficient out of the real estate fund to make up the amount of its claim, and the remainder

was awarded to the judgments of the exceptants.

Had the Trust Company been obliged to apply the amount realized from the sale of the collateral as contended for at the date of its receipt, then it would have been deprived of any security against the interest on its debt to accrue between September 5, 1895, the date of the final confirmation of the sale, and March 15, 1897, the date of distribution as per auditor's report. The effect of this will be seen by taking the second calculation in plaintiff's 5th exception as a basis. The balance unpaid after deducting money realized from sale of collateral is $14,312.92. Compute interest on this to March 15, 1897, date of auditor's distribution, and it amounts, principal and interest to $15,848.12 to which is to be added attorney's commission two per cent. $316.96 and costs $7.40, making a total of $16,272 48, while the whole amount that could be realized on the judgment treating it as its full face and interest and disregarding the amount to which it would be reduced by the payment on it of the proceeds of the collaterals, would be $16,210 00 or less than sufficient to pay the claim.

I do not think the holders can be compelled to so apply their collateral. It was their security against that debt and they had a right to deal with it so as to secure themselves against any possible loss, and if they saw that it was best for their own protection to do so they might hold the money and apply it only when they saw that their debt would be paid; In re Thorn. Smith's Appeal, 2 Pa. 331; Ayers v. Wattson, 57 Pa. 360; Kittera's Estate, 17 Pa. 416.

This virtually disposes of all the exceptions, excepting the 8th in reference to the attorney's commissions, which is sufficiently answered by the case of Warwick Iron Co. v. Morton, 148 Pa. 72.

The exceptions are dismissed and the auditor's report confirmed.

From this decree this appeal was taken.

Latimer & Schmidt for appellants.

Niles & Neff appelle.

July 15, 1897. FELL, J.—The facts which are important in considering the question raised are briefly these: In 1893 J. S. Wilhelm made an assignment of all his property for the benefit of his creditors to the Commonwealth Guarantee, Trust and Safe Deposit Company. The Trust Company at the time of the assignment held his promissory note payable on demand for $15,000.00, and as collateral security for its payment it held certain stocks and a judgment for $15,000.00, which was the first lien on his real estate. The company sold the stock collateral and realized from its sale, June 5th, 1895, the sum of $1,662.08 which was applicable to the debt secured by the note. As assignee it sold the real estate by direction of the court discharged of the lien of judgments. The sale was confirmed September 5th, 1895, and the amount realized was more than sufficient to pay in full its judgment of $15,000.00 with interest, and the balance went in part payment of the judgments of the appellants, who were subsequent lien creditors. The company made no application of the amount received from the sale of the stocks or of the amount realized by the sale of the real estate, and before the auditor it claimed and was awarded interest in full on its note to the date of distribution, March 17th, 1897.

The appellants, who are subsequent lien creditors, concede the right of the Company to receive full payment of the original note. but they claim that the amount realized from the sale of stock collateral should have been credited on the note on the day of its receipt, and that the amount applicable to the payment of the collateral judgment should have been credited on the note on the day of the confirmation of the sale of the real estate, thus reducing the amount of the original claim on those dates and stopping the running of interest.

The company sold the stock held as collateral not as assignee, but as pledgee. Its power under the terms of the pledge was to sell and to apply the proceeds to the payment of the note. This power it exercised, and it was bound to apply the proceeds at once. It could not, after converting the stock into money, hold the money as collateral and allow interest to run on the note. The power to sell was that it might pay the note, and when it sold and received the money its claim to that extent was extinguished. The real estate was sold discharged of liens by the assignee not under its general powers as assignee but by virtue of an order of Court granted in pursuance of

the provisions of the Act of February 17th, 1876, for the interest of all parties, and it received and held the proceeds in trust: first, for the lien creditors in the order of the priority of their liens; and secondly, as to any balance after the payment of liens, for the general creditors. The creditors whose liens were discharged were required to look to the fund, and interest on their claims ceased on the date of the confirmation of the sale; Carver's Appeal, 39 Pa. 276; Bank's Appeal, 96 Pa. 347. But they were entitled to their money on the confirmation of the sale and the payment to the assignee; Bank's Appeal, *supra*. The whole fund realized from the sale did not pass to the assignee to await the audit and the order of distribution among all the creditors. That part of it apportionable to liens which had been discharged was demandable by the creditors entitled to it. This has been the uniform ruling as to sales under the Act. In the opinion in Tomlinson's Appeal, 90 Pa. 224, it is said: "The payment of so much of the purchase money as will be sufficient to satisfy the liens divested by the sale should be required at the time of the confirmation of the sale or soon thereafter." And in Burkholder's Appeal, 94 Pa. 522, it was held that where time had been given for the payment of the installments of purchase money the interest thereon should be divided pro rata among the lien creditors. The later Act of June 10th, 1881, requires the assignee to accept the receipt of a lien creditor who may become a purchaser for the amount which the record shows him entitled to receive. The money apportionable to the collateral judgment held by the trust Company was received by it in 1895. It was payable to it as a lien creditor at once. There was no denial of the validity of its judgments or dispute as to the priority of its lien. It received the money for its own use, and as a trustee for all of the creditors it was required in their interest to apply it to the discharge of its debt at once.

The assignments of error relating to this subject are sustained. In the computation of interest on the claim of the Commonwealth Guarantee Trust and Safe Deposit Company the amount received by it from the sale of stock held as collateral, and so much of the amount received from the sale of the real estate as was apportionable to its collateral judgment should have been credited as of the dates of their receipt, and it is now directed that this be done. The order of the Court is reversed, and it is directed that distribution be made in accordance with this opinion.

SUPERIOR COURT.

Nace's Appeal.

Equity—Church government—Ownership of property.

A bill in equity was filed, asking for an injunction to restrain the defendants from the further use of, or injury to, certain property claimed by the plaintiff's as trustees of the church, under a deed in trust "to be kept, used and maintained as a place of divine worship by the ministry and membership of the Evangelical Association." At the time of the filing of this bill the plaintiffs were no longer members of said Association, having seceded from that Association and united with another. HELD, reversing the Court below, that the injunction must be refused.

These trustees were selected by the original association when they were members in full standing of the one ecclesiastical body, but held the empty title merely of this property for this unincorporated society. When they first seceded, and were afterwards expelled from the association who had full control of the church, it was a virtual renunciation by them of their right to exercise the power of trustees, and their control of any portion of the church property ceased.

Appeal from the decree of the Court of Common Pleas of York County, Pa., sitting in equity.

For the bill, answer and opinion of the court below, see Garret et al. v. Nace et al., 10 YORK LEGAL RECORD 49.

John W. Heller and *N. M. Wanner* for appellants.

Niles & Neff for appellees.

Suly 12th, 1897. REEDER, J.—This was a bill in equity, asking for an injunction to restrain the defendants from the further use of, or injury to, certain property claimed by the plaintiffs, as trustees of the Trinity Evangelical Church of West Manheim township, York county.

The plaintiffs claim title as trustees of the Trinity Evangelical Church under a

deed from Oliver Garrett in trust to be "Kept, used and maintained as a place of divine worship by the ministry and membership of the Evangelical Association of North America, with power to dispose of and convey the same, subject to the discipline, usages and ministerial appointments of said church or association as from time to time authorized and declared by the general conference of the said association, and the annual conference in whose bounds the said premises are situated."

The conveyance by the grantor to the original trustees was manifestly for the mere purpose of vesting the property in the congregation, they being at the time an unincorporated society.

At the time of the filing of this bill, it is practically undisputed that the plaintiffs were no longer members of the Evangelical Association of North America. They seceded from that association and united with an association called "The United Evangelical Church." They were subsequently expelled from the Church, and were cut off from all church rights and privileges by the regular ecclesiastical authorities of the Evangelical Association of North America. Their offices as trustees had been forfeited, and were, therefore, vacant before the filing of their bill. By their secession from the Church, they were no longer entitled to the control of the church property. This congregation collected among themselves the consideration that was paid to Garrett, the original grantor, as the purchase money for the property.

It was subsequently provided in the deed that the church was to be subject to the discipline, usages and rules of the Evangelical Association of North America. These trustees were selected by the original association when they were members in full standing of the one ecclesiastical body, but held the empty title merely of this property for this unincorporated society. When they first seceded, and were afterwards expelled from the association who had full control of the church, it was a virtual renunciation by them of their right to exercise the power of trustees, and their control of any portion of the church property ceased.

They, therefore, have no standing to come into court as plaintiffs in a bill in equity and ask for an injunction as trustees of said congregation to enjoin anybody from doing anything which affects in any way the interests or property of the said church.

The decree of the Court below is, therefore, reversed and the bill dismissed at the cost of the plaintiffs. This action makes it unnecessary for us to consider the different assignments of error in any further detail.

COMMON PLEAS.

March *v.* Smith.

Sheep law—Form of action—Acts of 1851 and 1893.

Plaintiff made complaint before a Justice of the Peace in accordance with the Act of May 25, 1893, for the killing of sheep by defendants, dog, and secured an award of $15 damages, from which no appeal was taken. Subsequently defendant killed the dog. Later plaintiff brought suit against the defendant before an Alderman, under the Act of 1851, P. L. 712, claiming damages from the defendant in the sum of $170 for the loss of the same sheep. The Alderman issued a summons in trespass for damages. HELD, on certiorari that the omission of the words *vi et armis* was fatal.

The Justice's record must show that he had jurisdiction and that he pursued it in a statutory form.

The title of the Act of May 25th, 1893, P. L. 136, "An Act for the taxation of dogs and the protection of sheep," while not giving full information to its contents, may be sufficient to command inquiry, and thus escape the constitutional inhibition.

The Act of May 25th, 1893, P. L. 136, does not repeal the Act of April 14, 1851, P. L. 712; but gives an additional remedy.

Certiorari.

The record of the Alderman, N. C. May, Esq., is as follows:

Summons in trespass for damages not exceeding $300.00. December 9th, 1896, issued to Henry A. Berry, constable, returnable on the 5th day of December, A. D. 1896, between the hours of 12 and 1 o'clock p. m. on said day.

December 10th, 1896, served by producing the original summons to the defendant and informing him of the contents thereof, on the 10th day of December, A. D. 1896, so answers Henry A. Berry, constable, on oath.

December 10th, 1896, subpoena issued for plaintiff for thirteen witnesses.

December 11th, 1896, subpoena issued for plaintiff for eight witnesses.

December 15th, 1896, at 1 o'clock p. m plaintiff appears with James G. Glessner, Esq., as counsel. Defendant being present asks for a delay of proceedings on account of absence of his counsel. Delay granted

And now to wit: At 1:30 o'clock p. m. defendant's counsel, N. M. Wanner, Esq., appears. Plaintiff claims one hundred and seventy dollars ($170.00) damages for the maiming and killing of plaintiff's sheep by defendant's dog.

Defendant's counsel denied the jurisdiction of the Alderman. It appeared from the evidence that the plaintiff before bringing this suit, had proceeded under the Act of Assembly of May 23rd, 1893, to recover damages for the loss of the same sheep sued for in this case, and that the township auditors had awarded him fifteen dollars ($15.00) damages for the same, from which award no appeal was taken.

Also that the defendant had killed his dog before the proceedings began. The defendant therefore claimed judgment in his favor, and against the plaintiff, for costs, which was refused. Plaintiff sworn. Daniel Spangler, David Spangler, Adam March, Charles Leash, Eli Speck, sworn for plaintiff.

Geoorge Hollinger, Township Auditor; Jacob Smith, Abnser Rauhouer, sworn for the defendant.

After hearing the parties, their proofs and allegations, judgment reserved until December 17th, 1896, at 1 o'clock p. m. And now to wit: December 17th, 1896, at 1 o'clock p. m. judgment publicly in favor of the plaintiff and against the defendant for six dollars ($6.00) as damages awarded, for the killing of two sheep, by the defendant's dog, with costs of suit.

To this record the following exceptions were filed:

1. The alderman had no jurisdiction of the alleged cause of action or the parties to it.

2. The proceedings before the magistrate are irregular, illegal, and insufficient in law to sustain the judgment against the defendant.

3. The magistrate had no jurisdiction, because the action was not trespass, *vi et armis*, for damages.

N. M. Wanner for certiorari.

James G. Glessner, contra.

July 5th, 1897. STEWART, J.—The ground in this action was the destruction of the plaintiff's sheep by the defendant's dog. The plaintiff made complaint in accordance with the Act of May 25, 1893, before a Justice of the Peace and secured an award of $15 00 damages in his favor from which no appeal was taken. It further appears by this record that the defendant, to relieve himself from personal lisbility to the plaintiff in accordance with the third section of the act referred to, killed his dog. The plaintiff then brought suit against the defendant, in which he claimed damages in $170.00 for the loss of the same sheep.

The exceptions to the record of the justice are:

1st. Want of jurisdiction.

2nd. That proceedings were irregular and illegal.

3rd. That justice had no jurisdiction because the action was not trespass *vi et armis*, for damages.

The second exception cannot be sustained. I find no such irregularity in the proceedings and none such are pointed to as would be sufficient to reverse the judgment.

Under the Act of 14th of April, 1851, Sec 8, P. L. (1852,) p. 712, a Justice is given jurisdiction of an action of trespass *vi et armis*, for the recovery of damages for the killing of sheep. So that while the Justice did have jurisdiction of the subject matter, his record does not show that he pursued it in a statutory form. This was essential; McGee v. Tressler, 1 Barr 126.

It seems to me that the omission of the words *vi et armis* are fatal as not showing that the remedy pursued was that given by the act of 1851, and I therefore sustain the second exception.

It was contended at the argument that the Act of April 14th, 1851, was repealed by the Act of May 25th, 1893, P. L. 136, and in reply to this that the latter act was unconstitutional in that it violated Sec. 3 of Art. 3 of the Constitution. The act is entitled "An Act for the taxation of dogs and the protection of sheep." While this title does not give full information as to the contents of the act, it may be sufficient to command inquiry, in which event it would seem to escape the constitutional inhibition; Com. v. Curry, 4 Superior Ct. 356; Com. v. Jones, Ibid

362. I cannot therefore sustain the constitutional objection. Nor am I convinced that the Act of May 25th, 1893, repeals the Act of April 14, 1851. It is not repealed expressly. Sec. 10 of the Act of May 25th, 1893, provides: "All Acts or supplements of Acts inconsistent with the provisions of this Act are hereby repealed." The Act of 1851 is not inconsistent with the provisions of the Act of 1893 The former simply gives to Justices of the Peace jurisdiction of a remedy by the injured party against the owner of the offending dog in what prior thereto would have been an action on the case while the latter act provides an elaborate system of providing a general fund for the payment of such damages, a method of ascertaining them and another for the ridding the community of such dogs. It certainly could not have been the intent of the Legislature to take away from a citizen the statutory right to kill a dog which he found chasing or worrying his sheep nor the right to proceed directly against the owner of such dog for damages, and it has been so held by at least one Court of the State; Com. v. Gebbie, 5 Dist. Rep. 159. I hold therefore that the Act of May 25th, 1893, does not repeal the Act of 1851, but gives an additional remedy in such cases.

However the injured party cannot pursue both remedies, and having selected one he cannot abandon it and chose another. He is bound by his election; 7 Enclyclopedia of Pl. & Pr. 361 et seq. and notes; Potts' Appeal, 5 Pa. 502 citing Tidds Pr p. 10.

In view of the facts as disclosed by the record I therefore sustain the first exception and set aside the proceedings.

C. P. of Delaware Co.

Zanziger v. The Wayne Electric Light Company.

Trespass—Eminent domain—Rights of electric light companies under the Act of May 8, 1889.

The Act of May 8, 1889, gives to electric light companies the right of eminent domain for the purpose of erecting and maintaining their poles and stringing their wires upon the public highways, but fails to provide a method by which the assessment of damages shall be made. The proper proceeding by a property holder is by an action of trespass on the case for damage actually sustained.

Inasmuch as the Act of 1889 provides no method for the entering of security and assessment of damages, an electric light company before proceeding to plant its poles should tender to property owners who may be injured a bond approved by the court. The court will however permit security to be afterwards entered *nunc pro tunc.*

Sur rule for a new trial

The essential facts in this case are fully stated in the opinion of the court.

V. G. Robinson for plaintiff.

Isaac Johnson for defendant.

March 1st, 1897. CLAYTON, P. J.—This is an action of trespass, *quare clausum fregit* to recover damages for planting electric light poles and stringing electric wires thereon, in the public road opposite the mansion of the plaintiff and upon the part of the road to which he has the fee subject to the public servitude of the highway.

The declaration contained statement that might have converted it into an "action on the case" for full and final damages for the erection and permanent future maintenance of said poles.

The plaintiff, however, before the jury were sworn, amended his declaration by striking out all statements therein that by implication might convert it into a "special action on the case" for permanent damages. His contention is, that the company defendant is not vested with the State's right of eminent domain and is therefore a trespasser, and that he has the right to punitive damages, especially after his right of action has once been settled, and that he may maintain successive actions until the tresspass is discontinued.

Upon the trial the court held that the defendant company was vested with the State's right of eminent domain but that, before entering, it should have tendered security, to be approved by the court, conditioned for the payment of all damages; that the planting of the poles and stringing of the wires was an extra servitude upon the plaintiff's fee, for which he was entitled to damages. We also held that as the plaintiff made no objection to the planting of said poles until six months after the defendant had constructed its plant, it would be inequitable to now permit him to recover in trespass by continued actions and punitive damages.

The court gave leave to the plaintiff to change the form of his action to "trespass on the case" and to go to trial for his entire damages for the permanent injury.

The plaintiff declined to amend, whereupon the court directed the jury to find for the plaintiff for nominal damages, with directions to the defendant to tender to the plaintiff, within ten days, a bond in $2000, conditioned for the payment of all damage, and on failure to comply, the verdict would be set aside and a new trial awarded.

The defendant has complied with the suggestion of the court and has filed the bond required with approved surety. The only question therefore between the parties is the defendant's right under the authority of the State to construct and maintain said poles.

We are still of the opinion that the Act of May 8, 1889, P. L. 136, investing such companies with the State's right of eminent domain, to enter upon the highway in question, and as the law giving the right has not provided the manner or mode of assessing the damages, the proper writ is a special action on the case; Haverford Elec. Light Co. v. Hart, 13 C. C. 369.

The Act that conferred the power does not seem to have provided the means of assessing the damages. The only remedy is by an action at law, or as the Supreme Court has said in Penna. R. R. v. Mont. Co. Pass. Ry., 167 Pa. Equity will interpose to protect the person whose land is injured if he comes in proper time, by enjoining the construction until his damages have been paid or secured. We have done this and have required the plaintiff's full damages to be secured to him. He may either proceed by *action on the case*, which, as a rule, is an equitable remedy in Pennsylvania, and will lie wherever a bill in equity could be filed, other than injunction bills, in England; or the plaintiff may adopt any other lawful means to have his damages assessed and paid.

Since this case was tried, the Supreme Court in Turnpike Road v. Harrisburg & M. St. Railway Co., 177 Pa. 585, have adopted the same principle by permitting security *nunc pro tunc* to be entered.

The decision as I read it, holds that where the State's right of eminent domain is given and no provision is made for security to make compensation, the Act is only unconstitutional so far as the giving of security is not provided for, which may be supplied by the corporation giving such security.

The rule is discharged.

Wrought Iron Bridge Co. v. York Manufacturing Co.

Mechanics' Lien—Bill of Particulars—Amendment.

Plaintiff asked leave to file an amended bill of particulars to a mechanics' lien, which was an entirely new and different bill, differing in nearly every item from the original bill and containing an additional item of over $2,000. This amended bill was attempted to be filed more than six months after the completion of the work. HELD, that the amendment must be refused.

The affidavit that the proposed amendment was "conducive to justice and a fair trial on the merits" should specifically show wherein the record or paper is defective, incorrect or wanting in particularity or substance. The amendment must be considered as a whole, and cannot be allowed for the reason that it fails to specify and describe the nature of the material furnished.

It is also defective because it introduces a new cause of action not in the lien and bill of particulars attached thereto.

On the trial, plaintiff may show that the dates in the bill of particulars are mistaken; but there is no case which decides that different amounts from those stated, may be proven.

Rule to amend bill of particulars.

The plaintiff filed the following mechanics' lien against the defendant:

The Wrought Iron Bridge Company, above named, of the City of Canton, and State of Ohio, hereby files its claim, or statement of demand, in the office of the Prothonotary of the Court of Common Pleas of the County of York, against the building and its appurtenances hereinafter described, and the ground covered thereby, and so much other ground, immediately adjacent thereto and belonging to the above named, The York Manufacturing Company, as may be necessary for the ordinary and useful purposes of such building.

The name of the claimant is The Wrought Iron Bridge Company, a corporation duly incorporated under the laws of the State of Ohio.

The name of the owner, or reputed owner, of the building, and the person with whom The Wrought Iron Bridge Company contracted is The York Manufacturing Company, a corporation duly

incorporated under the laws of the State of Pennsylvania.

The amount or sum claimed to be due is thirty-two thousand, five hundred and nineteen dollars and ninety cents, ($32,-519.90) for work done in erecting the iron or steel parts of the said building, as specified in the bill of particulars attached hereto, and material furnished, to wit: structural iron or steel, in the shapes and sizes required for the erecting of such building as specified in the bill of particulars attached hereto and made a part hereof, under a parol contract with the said The York Manufacturing Company, to do the said work and furnish said material for and about the erection and construction of the hereinafter described building, and for which said work and material, the said The York Manufacturing Company agreed to pay the just and reasonable value, and the said work and material are justly and reasonably worth the amount claimed as above.

The doing of said work, and furnishing of said material was continuous and was commenced July 13, 1895, and the last of said work was done and material furnished within six months last past, to wit: July 29th, 1896.

The said building, which was commenced July 13th, 1895, is located on a piece of ground, situate in the City of York, and the County of York, Pennsylvania, described as follows, to wit:

Then follows a description of the buildings, closing with the usual affidavit.

The sci fa. issued on this claim was set aside on account of defect in the time of service. An alias was issued and defendant ruled to plead. Subsequently an affidavit of defence was filed and the case came on for trial.

On the trial plaintiff's offers not agreeing with his bill of particulars, he suffered a voluntary non-suit, and then obtained a rule to show cause why an amended bill of particulars should not be filed.

To this rule the following answer was filed:

The York Manufacturing Company, the defendant above named, for answer to the rule granted by this court on June 8th, 1897, to show cause why amendment of bill of particulars of the foregoing lien should not be allowed, answering says:

1st. That said proposed amendment is too late, being moved for after more than six months had elapsed from the filing of the lien, and after more than six months had elapsed from the date stated in the lien as the period at which the last items of work and material were furnished.

2nd. That the proposed amendment is not such an amendment as is contemplated and permitted by the Act of June 11th, 1879.

3rd. That the paper filed as an amendment is not supported by affidavit, and there is no allegation or averment in it that the proposed amendment would be conducive to justice or a fair trial on the merits, and nothing in the amendment contained or averred, or in any wise before the Court from which the Court could even infer that the amendment, if allowed, would be conducive to justice and a fair trial on the merits

4th. That the paper filed as an amended bill of particulars is not an amendment of the former bill of particulars, but a substitute of an entire new bill, in which not a single item compares in date or amount, so far as relates to materials furnished, save "office gates," "lumber," "slate for stairs."

5th. There is nothing in the proposed amendment to show the character of the materials charged therein, or that the material was "structural iron or steel" which alone the lien purports to embrace.

6th. That the proposed amendment of the bill of particulars is contradictory of the lien as filed, in that the lien says the last material was furnished on July 29th, 1896, while the amendment gives a later date, to wit, August 11th, 1896, and the amendment in other respects contradicts the lien.

7th. The items of lumber, galvanized iron pipe, office gates. slate for stairs, are especially objected to as not embraced in the lien filed.

8th. The item "cost of mechanical engineer and supervisor," (attached to the bill of particulars for material) is specially objected to as not embraced in any of the allegations or description in the lien filed.

9th. That no material or labor was ever furnished by the plaintiff to the defendant under the contract set out and stated in the lien as filed, and the proposed amendment is irrelevant.

At the argument of the case the following affidavit was filed:

Frank M. Wyant, being duly sworn

according to law, deposes and says that he is the Secretary and Treasurer of the Wrought Iron Bridge Company, plaintiff in the suit of the Wrought Iron Bridge Company v. The York Manufacturing Company, in the Court of Common Pleas of York County, No 32, October Term, 1896; That the amendment of the bill of particulars attached to the mechanics' lien in said suit prayed for, by motion filed June 9th, 1897, is conducive to justice and a fair trial upon the merits; That the items of labor and material, amounts, dates and prices, are true and correct to the best of his knowledge, information and belief.

J. S. Black and *Niles & Neff* for rule.
N. M. Wanner and *Latimer & Schmidt* contra.

August 2, 1897. BITTENGER, P. J.—The plaintiff claims the right to file this amended bill of particulars under the second section of the Act of June 11, 1879, P. L. 123, which is as follows: "That in case of any mechanics' claim or lien, filed according to existing laws, in any county of this commonwealth, the court having jurisdiction in such case is hereby authorized and required, in any stage of the proceedings, to permit amendments conducive to justice and a fair trial upon the merits including the changing, adding and striking out of claimants, and by adding the name of owners or contractors respectively, whenever it shall appear to such court that the names of the proper parties have been omitted, or that a mistake has been made in the names of such parties, or too many or not enough have been joined in such case; *Provided*, That no amendment so allowed, shall have effect to prejudice the rights of *bona fide* purchasers for a valuable consideration without notice, or the rights of other lien creditors, when such purchase has been made, or such other lien would otherwise be prior if such amendment were not made or had not been allowed."

The Act of June 16, 1836, P. L. 695, under which the mechanics' lien is filed, among other things, requires the claimant "to set forth the amount or sum of work claimed to be due, and the nature and kind of work done, or the kind and amount of material furnished, and the time when the materials were furnished, or the work done, as the case may be."

These matters are usually set forth in a bill of particulars attached to the mechanic's lien. The requirements of the above recited provisions of the Act of 1836, necessitate sub-contractors, in all cases, to furnish a statement in the lien, or in a bill of particulars attached, of the matters and things enumerated. Contractors are required to comply with the requirements of the Act in all cases except "where the materials are furnished or work done in the erection of a building under an entire contract," in which case the building is chargeable with the contract price, if the lien is filed within six months from the consummation of the contract; Fourth Baptist Church v. Trout, 28 Pa. 153. The different times when the work was done or the materials furnished, need not be stated in such case. "One date is sufficient, and the claim will be good if the evidence proves that the completion of the contract was within six months from the time when the claim was filed, although the day stated in the claim as the time of the consummation of the contract may not correspond precisely with the one established by the evidence;" *Ibid.*

This rule only applies where the contract is entire, and the price to be paid for the erection of the building is fixed, by its terms. The reason is given for the rule, by Strong, J., in the opinion of the Supreme Court, in Russel v. Bell, 44 Pa. 47, as follows: "When the owner has made a special contract with the claimant and he has performed it, the contract is the measure of the owner's liability. He has no longer an interest in knowing how much work was done, or how many materials were furnished, or the kind and nature of each, for they cannot affect the extent of his liability. The reason for the statutory requisition no longer existing in such a case, the court held in Young v. Lyman (9 Barr 449) that the rule itself ceased."

The lien in this case, avers that "the amount or sum claimed to be due is thirty-two thousand, five hundred and nineteen dollars and ninety cents ($32,519.90), for work done in erecting the iron or steel parts of said building as specified in the bill of particulars attached hereto, and material furnished, to wit: structural iron or steel, in the shapes and sizes required for the erection of such

building as specified in the bill of particulars attached hereto and made a part hereof, under a parol contract with the said York Manufacturing Company to do said work and furnish said materials for and about the erection and construc tion of the hereinafter described building, and for which said work and material, the said The York Manufacturing Company agreed to pay the just and reasonable value, and the said work and material are justly and reasonably worth the amount claimed as above."

The price to be paid the claimant not having been agreed upon in the parol contract relied upon, it was not such an entire contract as relieved the claimant from specifically stating the matters and things required by the Act of 1836. That the plaintiff so understood it, is shown by the bill of particulars attached to the lien. The total amount due for work and materials furnished, after allowing a credit for $10,000.00, paid on account, appears in the bill of particulars to be $32,519.90, the amount stated to be due in the body of the lien.

The facts set forth in the lien appear, upon the face of the lien, to have been sworn to by F. M. Wyant, Treasurer of The Wrought Iron Bridge Company, as being true and correct.

When the case came to trial, the plaintiff entirely failed to prove the correctness of the items of the bill of particulars as to times or amounts, and accordingly enter ed a non-suit.

The plaintiff now asks leave to amend, by substituting in place of the original, an entirely new and different bill of particulars, differing in nearly every item from the original bill of particulars. To sustain plaintiff's application, Frank M. Wyant, Treasurer, who swore to the correctness of the lien as filed, makes affidavit that the proposed amendment "is conducive to justice and a fair trial upon the merits; that the items of labor and material, amounts, dates and prices are true and correct to the best of his knowledge, information and belief" And this, notwithstanding the fact that, in the amended bill of particulars, an item has been added to the list of materials furnished: "Cost of mechanical engineer and supervisor, $2,129.67," and that a careful footing up of the proposed amended bill of particulars (for some reason unexplained left unadded) shows an aggregate sum, after deducting the credit of $10,000 00, of $32,519.92, the exact balance claimed due on the original lien filed, in which nothing is claimed for "cost of mechanical engineer and supervisor."

An amendment of bills of particulars may be made after the time has expired for filing liens where a bill of particulars has been filed with the lien, to make the same more precise, specific and particular; Linden Steel Company v. Imperial Refining Company, 138 Pa. page 10.

Amendments after six months from the completion of the building, cannot be made where the lien is insufficient on account of an omission in the statement of a material matter or in case of a failure to state the proper name of the owner of the building. There is nothing in the Act of 1879 "which in the least degree gives sanction to the idea that the time for filing a lien may be extended beyond the six months, by way of amendment, or that any person may be thus introduced, against whom no right to file a lien existed when the amendment was made:" Knox v. Hilty, 118 Pa. 430; Dearie and wife v. Martin, 78 Pa. 55.

Amendments under the statute of 1879 can only be made in the manner allowed in amendments provided in other cases. The court must be satisfied that the amendment offered "is conducive to justice and a fair trial on the merits." This must be shown to the court by affidavit, or otherwise appear. The affidavit should, in such cases, specifically show wherein the record or paper is defective, incorrect or wanting in particularity or substance.

The affidavit in this case is general in its terms, stating boldly, that the proposed amendment "is conducive to justice and a fair trial on the merits and that the items thereof are true and correct to the best of affiant's knowledge, information and belief." He is the same person who swore to the correctness of the original lien and bill of particulars. We have seen that there did not appear then any claim for the sum of $2,129.67, for cost of Mechanical Engineer and Supervisor, and yet the balance claimed to be due is the same which is found upon adding up the amended bill of particulars. This affidavit does not allege or specify

any mistake by any person, either party, agent, officer or counsel, in filing the original bill of particulars. It gives no reason for the substitution of the new bill of particulars for the old, or any part of the same, and fails to satisfy us that the amendment is "conducive to justice and a fair trial on the merits." Neither is there anything on the face of the papers, nor were there any facts alleged by the plaintiffs' counsel, on the argument of the case, to satisfy the court that the amend mend offered is "conducive to justice or a fair trial on the merits."

There is, therefore, an entire absence of evidence and circumstances requisite to entitle the plaintiff to have the amendment made as offered. Besides, the amend ment must be considered as a whole and cannot be allowed for the reason that, it fails to specify and describe the nature of the material furnished, and because in the item of $2.129.67 for "Cost of Mechanical Engineer and Supervisor" it introduces a new cause of action not in the lien and bill of particulars attached thereto. This item being absent from the lien and claim, there is nothing to amend by, as to this claim. This alone, is sufficient to warrant a refusal by the court, of the proposed amendment.

As to the dates contained in the bill of particulars attached to the lien, it appears from The Fourth Baptist Church v. Trout *et al.*, 28 Pa. 153; Hillary v. Pollock, 13 Pa. 186; Rush v. Able, 90 Pa. 153, and other cases, that the plaintiff may, if he can, at the trial, show by competent evidence, that they are mistakes; but as to amounts, we have found no cases which decide that different amounts from those stated, may be proven

The rule to amend is discharged and the amendment is refused.

Delta Building and Loan Association v. McClune.

Judgment—Satisfaction of—Error.

Defendant in a Building Association judgment made an arrangement with M. to borrow the money for him to pay off the Association's claim, the judgment to be assigned to M. as security for the loan. For the purpose of showing M. the judgment, and with the idea that a differently worded judgment would have to be used, but with no thought of the judgment losing its place on the record, the Secretary of the Building Association wrote to its Attorney asking him to satisfy the same and send it to the former. This was done, and as there was a subsequent judgment against the defendant, M. refused to loan the money and the Building Association was not paid, whereupon its petition was filed, asking to have the satisfaction stricken off. HELD, that the judgment must be re-instated, without prejudice to the rights of intervening lien creditors or purchasers.

Where there was an entry of satisfaction by mistake, or where it has been procured by fraud, the Court will relieve.

Payments made to a Building Association by a borrower are not necessarily credits on his judgment.

Rule to strike off satisfaction of judgment.

Chas. A. Hawkins for rule.

H. H. McClune and *Horace Keesey*, contra.

April 19th, 1897. STEWART, J.—This is an application on the part of the plaintiff to strike off the satisfaction entered on the record of the above judgment which is alleged to have been erroneously done. It is resisted by the defendant and also by the defendant's surety, Samuel Grimes, in a subsequent judgment, No. 99 January Term, 1895, against the defendant and which subsequent judgment was assigned for value to V. K. Keesey, Esq., by James M. Parker, the plaintiff therein, before the entry of the alleged erroneous satisfaction. The evidence taken in support of the application shows that W. Edwin McClune, had arranged to get money from William McSparren with which to satisfy the claim of the Association against him, but that before lending the money Mr. McSparren desired to see the judgment as he was to take the same from the Association as security for the money to be loaned to McClune.

McClune and McSparren both presented themselves to the Secretary of the Association, J. Egbert Smith, who in order to carry out their design undertook to get the judgment bond. He wrote to Chas. A. Hawkins, Esq., Attorney for the Association, who was fully authorized by a written power of Attorney duly recorded to satisfy judgments and mortgages in favor of the Association when paid, as follows:

"DELTA, PA., January 19, 1897.
MR. CHAS. A. HAWKINS,
York, Pa.

Dear Sir:—Enclosed you will find cer-

tificate of judgment held by Building As sociation against W. Edwin McClnue. *If this Judgment is the first against the property* please satisfy it and send it to me, otherwise please return the certificate. (Signed.) Yours truly,

J. EGBERT SMITH."

Mr. Hawkins upon receipt of this letter examined the record and found it was the first lien against the defendant and therefore satisfied it as directed. The Secretary had authority to direct the satisfaction of judgments and mortgages in favor of the Association when paid but not otherwise. In this instance the judgment had not been paid and what the Secretary did was in his effort to accommodate the defendant and to enable him to get the money elsewhere. He testified: "Mr. McClune and Mr. McSparren came to me for the purpose of making settlement or as I understood it, Mr. McSparren was going to furnish Mr. McClune the money and pay off the judgment. I gave Mr. McSparren a statement. He said he was willing to take the judgment at that price, at those figures. He further said he wanted to see the judgment, remarking that he did not want to invest anything until he had seen it. I told him I thought I could get him the judgment through an Attorney. * * * He left it with me to do this. When I sat down to write to Mr. Hawkins for the judgment and judgment bond, it occurred to me that I did not know just how these bonds were given up and did not know whether I could get it, whether they were given back before they were satisfied—whether there was any conditions or circumstances by which they were taken away before they were satisfied, and just thought he was going to take it anyway, and a judgment of this kind is not a very desirable thing between individuals; it is not worded—it is not conditioned as we have judgments between individuals.

"Without comprehending the results or what I was doing, or what the result would be I wrote Mr. Hawkins to satisfy it. I did this with the full intent that the judgment that Mr. McClune would give Mr McSparren would take its place just as it had been, just the same as if the judgment had been assigned. There was no thought of relinquishing any claim until it was paid, and as I remarked before I didn't comprehend. It was done in a moment when my mind was not clear on the question and I didn't comprehend what the result would be. I did it with no thought of the judgment relinquishing its place on the record." He further testified that the judgment was not paid.

It is quite evident from this testimony not only that the judgment was not paid, but that the Secretary made a mistake in directing the judgment to be satisfied when he really intended that it should be assigned to McSparren. He was dealing with something he did not fully understand and unless others have been prejudiced in their rights by his misdirection to satisfy the judgment, the Association should not suffer as the result of his mistake.

The Courts have been frequently moved to similar action, both where there was an entry of satisfaction by mistake or where it has been procured by fraud; Murphy v. Flood, 2 Grant 411; Bowman v. Forney, 15 C. C. 134; McCune v. McCune, 164 Pa. 611; West's Appeal, 88 Pa. 344; Gray's Estate, 7 W. N. C. 542; Fleming v. Parry, 24 Pa 51; Brown v. Henry, 106 Pa. 262; Lancaster v. Smith, 67 Pa. 427.

The subsequent lien creditors are only those who were such creditors when the mistake was made, and by striking off the satisfaction they lose nothing except what they gained by the mistake, and this in equity they are not entitled to hold, to the prejudice of the plaintiffs

Another question was raised by the defendant and Mr. Keesey, the owner of the subsequent judgment, as to how much is due on this judgment, and the Court was asked not to reinstate the judgment, if at all, for more than the amount actually due thereon.

While this question is not raised by the defendants' or contestants' answers, yet I would be inclined to think that it is a matter within the power of the Court and that the Court ought not permit the judgment to be reinstated for more than is actually due thereon if this were satisfactorily shown. The defendant testified that he received only $503.50 when he gave the judgment for six hundred dollars, and that he paid about $150, on his stock to the Association, and that there was an assessment on his stock of $12, but he does not say he paid this. While

he may have paid these sums he is not necessarily entitled to credit for them on account of his judgment; Association v. Swartz, 9 YORK LEGAL RECORD 173; Association v. Carroll, 15 C. C. 522; Strohen v. Association. 115 Pa. 273; Callahan's Appeal, 124 Pa. 138; and the proof is too meagre to enable the Court to ascertain what is due.

Should the defendant and the Association be unable to agree as to what amount is actually due on the judgment, which is not probable, the defendant still has a remedy by applying to the Court to open the judgment or to direct an issue to ascertain what amount is still due thereon.

The rule therefore is hereby made absolute, and the satisfaction is stricken off and the judgment is reinstated, but without prejudice to the rights of the intervening lien creditors or purchasers if any such there be.

It is further ordered that the plaintiff pay the costs of these proceedings.

C. P. of Lackawanna Co.

Com. ex rel. Curren v. Schubmehl.

Borough council—Organization—Quorum—Minutes.

At a meeting of the borough council of Olyphant held for the purpose of organization, nine of the twelve members constituting said council were present. The minutes show that upon an election for the office of secretary, six members voted for S. the other three being present, but not voting. HELD, that S. was duly elected.

The law imposes upon the Secretary the duty of recording the action of councils, subject to correction by the council themselves, and in the absence of fraud or corruption his record will be accepted as the best evidence of the action of the council; nor—this element being absent—can it be attacked collaterally in a proceeding of this character.

Quo Warranto. Rule for new trial.

The evidence produced at the trial of this case shows that on March 11, 1896, the council of the Borough of Olyphant met for organization. Nine of the twelve members were present, and it is undisputed that they all took part in the organization, so far as the election of the president was concerned, six voting for and three against Mr. Davis. The minutes of the meeting kept by the retiring secretary show that on the election for a new secretary, six voted for Mr. Schubmehl and the other three were present, but did not vote. No action was taken to have the minutes corrected, but upon the trial, the relators attempted to assail this record by parol testimony showing that the three members recorded "as present but not voting," had withdrawn at this time, thus breaking the quorum. This the court refused to admit, and directed the jury to find in favor of the respondent, whereupon the relators excepted and took this rule.

O'Brien & Kelly and *Burns* for relators.

Warren & Kapp for respondent.

May 24th, 1897. ARCHBALD, P. J.—Notwithstanding the able argument of counsel for the relator, we are all of the opinion that no error was committed at the trial and that the present rule should be discharged. The meeting of council on March 11th, 1896, at which the respondent was chosen secretary was duly organized by the presence of nine members out of a total of twelve. After the election of Mr. Davis as president by a vote of six to three, Mr. Schubmehl was nominated for the office for which he aspired. A vote was then taken, and the same six who voted for Mr. Davis for president, voted for Mr. Schubmehl for secretary. As to the other three members, the minutes state that they were present but not voting. The relator excepts to this, and contends that this is a misstatement, and he offered to show that the three had withdrawn at the time, breaking the quorum, and nullifying the vote. The law imposes upon the secretary the duty of recording the action of councils; Act 3 Apl., 1851, P. L. 324. and subject to the correction of his minutes by the council themselves, and in the absence of fraud or corruption his record is to be accepted. It is not for us in a proceeding of this character to revise, much less to overthrow it by parol as the relator would seek to have us do. We think it was within his province and his powers to note the presence of three members who did not vote as well as the six who did. He was not confined to the use of his hearing alone, but was entitled to employ his eyesight as well in determining the action taken. There is nothing in parliamentary law which compels a man to limit himself to one sense, when he has five. If this did not correctly represent what took place it was open to those who disputed it to have it

corrected in due course, which has never been done. The negative action of councils in refusing by a tie vote to confirm these minutes did not have this effect; they did not require confirmation and therefore they were not overturned by the failure to get it; they hold good until some positive action has been secured against them, because—as we have seen—the statute imposes on the secretary the duty of keeping them, and the presumption is that he has done so correctly.

Even if that part of the minutes which is particularly objected to—the noting of the three members as being present but not voting—were stricken out, it would not defeat the respondent's title. The record would still show a vote of six in his favor, and silence as to the other three who were present at the opening and presumptively present still, would be sufficient. This is squarely ruled in State v. Vandosal, 131 Indiana 388. At a meeting of six school trustees for the purpose of electing a county superintendent, after several ineffectual ballots, three of the trustees present declared their intention to take no further part in the proceedings, and withdrew from where the balloting had been done, though not from the room. On the next ballot the three remaining members voted, and it was held that the party for whom they voted was duly elected, having received a majority of a quorum the others being treated as present but not voting. Says Olds, J.: "The full number of trustees met and organized, and must be held to be present when the final vote was taken and the appellee declared elected. There was no such absence of the three trustees as can be said to have broken the quorum. As appears from the facts alleged the meeting was in the auditor's office, and there were bystanders looking on and listening to the proceedings. The three trustees stepped from the part of the room occupied by them, among the bystanders. They could not change from trustees to mere spectators in the same room where they still had an opportunity to act and vote with the others and thus prevent an election. Being present, it was their duty to act; they were in fact present. The president had a right to treat them as a part of the board, and they must be treated as present and failing or refusing to vote. The statement to the clerk by one of them that they protested or that they would take no further part, and stepped out among the bystanders, amounted to nothing." In Atty. Genl. v. Shepherd, 62 New Hamp. 383, a statute constituted four aldermen a quorum; the journal showed that six members were present at a certain meeting at the time the vote in question was taken, although only three voted. It was held that the refusal of the three members to vote was inoperative, and that being actually present, though not voting, they would be counted to make up the necessary quorum. See also the same effect State v. Green, 37 Ohio 227; U. S. v. Ballin, 144 U. S. 1, and compare Comth. v. Wickersham, 66 Pa. 134, Exparte Rogers, 7 Cowen, 526.

It is not necessary to discuss this matter further. The minutes of the meeting were not open to the collateral attack attempted to be made upon them in this action, and were the best evidence of the action of the council in the absence of corruption, bad faith or a clear abuse of power; Whitehead v. School Dist., 145 Pa 418; McCra v. School Dist., 145 Pa. 550. They sufficiently disclose the presence of a quorum, and the election of the respondent by the vote of a majority of it.

The rule for a new trial is discharged, and judgment directed to be entered in favor of the respondent, with costs, upon payment of the jury fee.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Replevin— Owner — Time.—Not the tenant only, but anybody claiming to be the owner of goods distrained, may replevy. The time for replevin is not limited to the five days next after distress taken, but is allowable at any time prior to the actual sale of the distress on the warrant by the constable or sheriff. The Act of April 3rd, 1779, forbidding replevin of goods in custody of certain officers does not apply to landlords' warrants.—*Summer Piano Company et al. v. Wood et al*, (Luzerne C. P.) 8 Kulp 494.

COMMON PLEAS.

Dierich v. Shank.

Judgment—Opening of—Evidence.

Defendant's petition averred that the note upon which judgment was entered was not signed by him or by his authority; that it was not his customary method of spelling his name; that he was not indebted to the plaintiff at the time nor did he contemplate making her a gift of that or any other amount. The answer denied all these allegations. HELD, that the evidence in this case was insufficient to induce the Court to open the judgment.

Pending the taking of the depositions and after the testimony of the defendant had been taken, and before the testimony of the plaintiff was taken, the defendant died. HELD. that the testimony of the plaintiff taken subsequently must be disregarded.

Rules to open the judgment, stay execution and dissolve attachments.

The petition on which the rules were founded is as follows:

That to No. 254 August Term, 1895, there was entered upon a warranty of attorney in the court, a judgment in favor of Emma Dierich, (now Whitehill) against your petitioner for the sum of two thousand ($2,000) dollars, date April 15, 1890, payable five years after date, with interest thereon from April 15, 1890.

That upon this judgment so entered to No. 254 August Term, 1895, a writ of Fi. Fa. issued to No. 3 October Term, 1895, and that to No. 18 October Term, 1895, an attachment execution issued, attaching certain moneys in the hands and possession of George W. Whitehill by judgment No. 1503 January Term, 1895, and of Annie Singer by judgment No. 274 April Term, 1894, this county's Common Pleas, and that up until the entry of said judgment and the issuing of said writs your petitioner had no knowledge of the existence of said judgment or any proceedings had upon the same.

That your petitioner being unable to either read or write is informed and believes his name, Andrew Shenck, has been signed to this judgment by his mark and the written name Andrew Shenck witnessed by John A. Willis, a then acting Justice of the Peace in Goldsboro this county. That there are three separate and distinct handwritings in the body of this note, none of which are his, nor did he authorize any one for him to so write.

That your petitioner was not indebted to the said Emma M. Dierich on April 15, 1890, in the sum of two thousand ($2,000) dollars, or any part thereof, nor since.

That the name written Andrew Shank is not his name, nor did he authorize its spelling in this way. Andrew Schenck being his usual and accustomed way of spelling the same. That your petitioner denies ever having written or authorized any one for him to subscribe his name in writing or by mark to this judgment note, nor did he sign the note and warrant of attorney upon which said judgment has been entered, nor did he authorize any one to sign his name thereto as he was not indebted to the said Emma M. Dierich (now Whitehill) in any sum of money at the time of its being so subscribed; nor did he contemplate a gift of this or any other amount to her the said Emma M. Dierich (now Whitehill.) That your petitioner charges the forging of his mark and name to some one to him at this time unknown and denies the execution thereof and any liability whatsoever upon the same.

That inasmuch as the property of your petitioner has been levied upon and attached by the Sheriff of York county, Penna., by virtue of the aforesaid writs of Fi. Fa. and attachment execution, and as it is threatened to deprive your petitioner thereby of his property for the payment of a debt which he does not owe and upon a judgment upon which he is not the defendant.

Now therefore the prayer of your petitioner is that a rule may be granted upon the said Emma M. Dierich (now Whitehill) to show cause why this writ of Fi. Fa. should not be stayed, the writ of attachment execution be dissolved, and why the judgment entered to No. 254 August Term, 1895, should not be opened and the defendant let into a defense and that all proceedings upon these several writs of execution be stayed and stopped.

Plaintiff's answer was as follows:

1st. That true it is, that to No. 254 August Term, 1895, there was entered upon warrant of attorney in the court, a judgment in favor of Emma Dierich (now Whitehill) against Andrew Shank, the

above named defendant, for the sum of two thousand ($2,000 00) dollars, dated April 15th, 1890, payable five years after date, with interest thereon from April 15th, 1890.

2nd. That true it is that upon this judgment su entered to No 254 August Term, 1895, a writ of Fi. Fa. issued to No 3 October Term, 1895, and that to No. 18 October Term, 1895, an attachment execution issued attaching certain moneys in the hands and possession of George W. Whitehill by judgment No. 1303 January Term, 1895, and of Annie Singer by judgment No. 274 April Term, 1894, this county's Common Pleas. But that it is not true, that up until the entry of said judgment and the issuing of said writs the petitioner had no knowledge of the existence of said judgment.

3rd. That it is not true as your respondent is informed and believes that the petitioner is unable to read and that it is not true that he did not authorize any one for him to write in the body of this note.

4th. That it is not true as stated by your petitioner that he was not indebted to the said Emma M. Dierich on April 15th, 1890, in the sum of two thousand ($2,000.00) dollars or any part thereof, nor since. But that on the other hand the said Andrew Schenk was indebted to the said Emma M. Dierich now Whitehill, in the sum of two thousand ($2,000 00) dollars at the time said note bears date, to wit April 15th, 1890.

5th. That it is not true as stated in your petitioner's petition, that he ever authorized any one for him to subscribe his name by mark or writing to this judgment note nor that he did sign the note and warrant of attorney upon which said judgment has been entered nor that he authorized any one to sign his name there as he was not indebted to the said Emma M. Dierich (now Whitehill) in any sum of money at the time of its being so subscribed.

But on the other hand he the said Andrew Shank made his mark to said note in the presence of the subscribing witness thereto, John A. Willis and the said note being read to him the said Andrew Shank and explained to him before he made his mark thereto, and that he was indebted to the plaintiff in said note in the sum of two thousand ($2,000.00) dollars at the time said not bears date.

6th. That it is not true as is charged in said petition that his mark was forged by any one, but that he actually made his mark himself to said note as aforesaid.

Your respondent therefore prays the court to discharge said rule at the cost ot the defendant or give such other and further relief to her as may seem meet and just. And she will ever pray, &c.

Cochran & Williams and *E. R. Sponsler* for rule.

E. D. Bentzel and *N. M. Wanner*, contra.

July 5th, 1897. STEWART, J.—The note upon which the above judgment is entered is alleged to be a forgery and this is the principal question involved in the consideration of this rule. The defendant denies that the note was signed by him or his authority, and also any consideration therefor. The latter question however is not very important since it will stand or fall with the question of the genuineness of the note.

The judgment is entered on a note for $2,000, under seal dated April 15th, 1890, payable five years after date with interest with warrant of attorney to confess judgment. The name of the maker, Andrew Shank, is written by another and his mark is affixed and is witnessed by John A. Willis. The handwriting in the note is apparently that of the party who signed the name of the subscribing witness excepting the middle letter M, and the last name of the payee, Emma M. Dierich, which is in a different handwriting. The first name, Emma, appears from inspection to have been written by the party who subscribed the name of John A. Willis.

The defendant in his application to open the judgment denies that he spells his name Shank and contends that he spells it Shenk. This is not material for the reason that whether he made his mark or not to the note, he did not write the name and the fact that it is mispelled does not prove that he did not make the mark. He testifies also that he can not write or read writing, and would not therefore be likely to detect an error in the spelling of his written name. He testifies that he reads English a little but that Dutch is his language.

Judgment was entered on this note

September 25th 1895, and execution issued thereon on the 26th day of September, 1895, and an attachment in execution issued thereon on the same day and on October 21, 1895, an application for this rule was made, and proceedings stayed.

In support of the rule depositions were taken in which the defendant testified that he did not sign the note or make his mark thereto, or authorize any one to do so for him; he also denied that he was indebted to the payee who is his daughter; he admitted that he had been indebted to her in $1200, for money borrowed from her, but claimed he had paid her off when he sold a farm to Mrs. Annie Singer. As to this payment he is corroborated by his son Levi Shenk, who testified that he paid over the money. This testimony does not however go to the main question, namely the genuineness of the note. The defendant called John A. Willis whose name is signed as a subscribing witness to the note. Willis denies that the signature is his. He says it represents his but it is not his. The case hinges largely on the testimony of Willis and therefore I will examine it with some care.

John A. Willis was formerly a Justice of the Peace at Goldsboro in this county in the vicinity of which the plaintiff and defendant lived and resided there at the date of the note. He is sixty-one or two years of age and lives now and has lived since prior to December 12, 1892, in the City of Harrisburg. He was called as a witness by the defendant first and denied having written the note, denied that Shenk made his mark to it in his presence, and denied that he had written his own name on it as a witness, and denied that he had seen the note until within two or three months of the date of his examination, when he saw it in the Prothonotary's office at the Court House, and further denied that he had seen it at Harrisburg, Pa. He admitted that he had seen another note at Harrisburg with his signature on it. He admitted that he had seen and made an affidavit to a note at Alderman Jackson's office in Harrisburg that did have his signature on it, but that it was for a less amount, being for $200 or less. He said he could not tell the date of that note; that it was shown to him by George W. Whitehill, husband of the plaintiff and that he made oath there that his signature as a witness thereto was his, but that note was for a less amount. The witness further testified that Mr. Bentzel, counsel for the plaintiff, had called him into a side room during the morning of the day on which the testimony was being taken and showed him the note in suit, but he denied that he said to Mr. Bentzel, that barring out the words "Emma M. Dierich," he would say that the balance of the note was in his handwriting." He said however, that he did say in that conversation 'had it not been for those [words Emma M. Dierich] I might be made to believe or something to that effect." In reference to the similarity of the handwriting to his he said "It is as near as it could possibly be by the looks of it," p. 9, notes of testimony, and that his only reason for saying it was not his signature was that the paper was for a different amount. That the paper was signed at his office and that the plaintiff was with the defendant at the time, and that he never wrote but one note from the defendant to the plaintiff; that that note was larger than the one in suit, and showed that it was about one-quarter of an inch larger and then said "all the notes that I drew up for Mr. Shenk for Mrs. Whitehill I furnished myself." The witness further said that what he swore to in Squire Jackson's office at Harrisburg was true

In reply to this testimony the plaintiff called George W. Jackson, above referred to, who testified to having drawn the affidavit made by John A. Willis in the presence of Willis and George W. Whitehill and read it to Willis before swearing him to it. That there was a note present when he drew the affidavit, and that he pinned it to the affidavit, but when shown the note in suit he was unable to say if it was the same note, but that the note he attached to the affidavit called for two thousand dollars and that he had no recollection of seeing more than one note.

Mr. Whitehill, husband of the plaintiff, testified that he was in the side room of Mr. Bentzel's office when Willis was interrogated by him about the note; that Willis did say, "barring out the name Emma M. Dierich he would say the balance of the note, excepting the mark was written by him, and that he signed it as

a witness." He testified that on December 12, 1892, he went to see Mr. Willis at his house in Harrisburg about this note because there was but one witness to the mark, and asked him if he had drawn up the note and that he acknowledged that he did and that he saw the defendant make his mark to the note. He said "I asked him if he was willing to go before a Justice or Notary and make an affidavit to that effect and he said he was; that they then went before Alderman Jackson who took the affidavit, Paper No. 1. That this note was shown to him then and prior to that and that the note and affidavit were pinned together there by Jackson. That the affidavit was read and explained to Willis before he was sworn to it. That Willis afterward at witnesses house acknowledged that he recollected about making the affidavit at Harrisburg, and that he had drawn up the note at the order of Andrew Shenk, and would still acknowledge his signature to it. That subsequently, a couple weeks before the taking of the testimony, he saw Willis again in reference to the matter and then he utterly denied ever drawing up the note, making the affidavit and all knowledge of it. Witness then recalled his going to Alderman Jackson and making the affidavit and read it to him and he then acknowledged having made the affidavit.

Baltzar Newport was called by the plaintiff and testified that he was present in Mr. Bentzel's side room when he presented the note to Willis, and asked him whether it was his handwriting, and he looked at it, "Says he took his spectacles off—then and said I must acknowledge that that looks like my handwriting," and further on the witness said. He acknowledged that he wrote part of that note, "it looks like my handwriting."

The affidavit referred to in the testimony is as follows:—

City of Harrisburg, } SS:
Dauphin county, }

Before me, the subscriber, G. W. Jackson, one of the Aldermen in and for the county aforesaid, personally came John A. Willis of the City of Harrisburg in the county of Dauphin, State of Pennsylvania, who being duly sworn according to law, doth depose and say, that on the 15th day of April, 1890, he signed his name as a witness to the mark of Andrew Shank to a judgment note of $2,000, payable to Emma M. Dierich five years after date; that he was present and saw Andrew Shank make his mark to said note which is hereto attached; that the said note was read and explained to the said Andrew Shank before he made his mark to the same.

JOHN A. WILLIS.

Sworn and subscribed to before me this 12th day of December, 1892.

[Seal.] G. W. JACKSON,
Alderman.

It would seem from what has preceded and from the affidavit and testimony of Whitehill and Jackson and the admissions of Willis in reference to it, that the case might be rested here and this rule disposed of. It is not possible that the testimony of Willis and his affidavit can both be true and yet he admits that he made the affidavit and that it is true. He did in a feeble sort of manner undertake to say that he did not understand the affidavit as to the amount of the note referred to, but the testimony is convincing that no other than the $2,000 note was present when the affidavit was drawn, and I cannot assume in support of his uncertain testimony that Alderman Jackson erred in copying the substance of the note into the affidavit. In fact there is no room to doubt on this subject.

But it is not necessary that the case should rest upon the ascertained fact of the genuineness of Willis' signature. There is other evidence in support of this note coming from the defendant himself utterly contradictory of his allegations, and in support of the note which he has not attempted to explain.

John Spangler testified that the defendant told him that the plaintiff has a note against him, but couldn't tell him when it was.

George W. Whitehill, husband of the plaintiff, testified that on one occasion when he had been to the defendant's to see the daughter, the defendant told him that he had given her a note—that she had money, that she got it from a former husband.

Mrs. Catharine Curran testified that she waited on the plaintiff when she was confined in April, 1892; that her father, the defendant, was there at the time; that he told the witness that he owed the plaintiff money and that she held a note

against him; that she mentioned the matter to the plaintiff, who asked her who told her and she said the defendant; that after tea plaintiff told her to go and get the note and she got it out of a till in her bureau, that the defendant was present and look at the note; that he could not see right and witness brought him a pair of glasses; that he said that is my note—that is the right note; that she remembered it by the mark he made on the note, and he said that was his Kreutz or cross; that the cross was on the note then the same as now; that she saw the note a year after when she was helping clean house; that on this first occasion the defendant said plaintiff should take good care of it that she didn't know what might happen; that the boys would take everything, and the next day defendant went home and before going he said to witness he hoped nothing would happen and if anything should happen she should see that this note was taken care of; that defendant spoke of Mr. Willis in connection with this note; he said this is the note John Willis wrote for Emma. The witness further said in reply to a question put by Mr. Wanner as follows: "This is the only note that was talked about that day and shown to him?" Answer. "Yes sir, that is the only note" While this testimony does not go to establish the signature of John A. Willis as a witness to the note, it does tend to show an indebtedness on note by the defendant to the plaintiff. It further proves, if believed, and there is no attempt at contradiction of the testimony of Mrs. Curran, that as early as April, 1892, the plaintiff was in possession of the identical note in suit. It is not shown that plaintiff ever held any other note from defendant, nor a note for a different amount, nor does he himself say so or attempt any such explanation as that of Willis that he had given her a note for $200, or less, on which Willis was a witness. On this subject the testimony of the defendant is entirely silent. The defendant is now dead but he was living when Willis testified in reference to drawing and witnessing a note of about $200 in favor of the plaintiff, and lived for more than a year after that date, but he neither affirms or denies the story. If it were true why did he not do so? The fact that he did not makes strongly against Willis' testimony on that subject and weakens his own and strengthens the plaintiff's case.

The defendant here relies upon the testimony of himself and Willis to make out his case. As I have shown the testimony of Willis is demolished by his own previous affidavit and that of the defendant by the testimony of Mrs. Curran, not to go into the weaker testimony of other witnesses making against both. The affidavit of Willis made before Jackson is certainly more to be relied upon than the uncertain memory of the witness three years afterwards. It stands as an unquestionable and disinterested witness against him and so far as appears Mrs. Curran stands in a similar position against the defendant. If they are not interested or not shown to be, why should they not be believed against those who are, particularly when the defendant and his principal witness are not in harmony.

Upon this testimony there does not seem to be any room for serious dispute, and such being the case I deem it my duty to discharge the rule.

It has been earnestly contended by defendant's counsel that such a statement of facts had been shown by the evidence as necessarily required a submission of it to a jury. I do not agree with this contention. The facts are in no wise complicated, the number of witnesses are few and their testimony readily weighed and understood, and this being the case I have no hesitation in determining the facts in accordance with the following authorities; Jenkintown Bank's Appeal 124 Pa. 337; Wernet's Appeal, 91 Pa. 319; Scott's Appeal, 123 Pa. 155; Eudy's Appeal, 90 Pa. 321.

Pending the taking of the depositions and after the testimony of the defendant had been taken and before the testimony of the plaintiff was taken, the defendant died. The competency of the plaintiff was objected to This objection is sustained. She was clearly incompetent; Hay's Appeal, 91 Pa. 265. I have therefore disregarded her testimony in arriving at my conclusions of fact.

The rule is to open the judgment, staying execution and to dissolve the attachment are discharged.

Boner v. Meyer.

Habitual drunkenness—Judgment against Eefence to.

Plaintiff presented his petition asking for a rule on defendant's committee to pay this judgment. The note on which judgment was entered was signed by defendant before he was found to be an habitual drunkard under the proceedings duly held, and approved by the Court. Defendant's Committee in its answer averred that defendant denied ever having signed the note; that he received no value therefor and was not indebted to plaintiff in any amount; that defendant's condition was often such as to render him frequently unconscious of what he was doing; and if he signed the note it was done at one of these times. HELD, that the evidence in this case is not sufficient to induce a Court to open a judgment, and consequently the rule on the Committee to pay must be made absolute.

A judgment entered against a defendant who has been found by inquisition to be an habitual drunkard, does not give the plaintiff any priority of lien nor can he issue execution thereon.

The judgment having been entered on a warrant executed before defendant was found to be an habitual drunkard, no necessity exists for suit to recover judgment.

If the evidence as a whole is sufficient to move a Chancellor to open the judgment for fraud, accident or mistake, the rule to compel the Committee to pay the judgment must be discharged. If not, it must be made absolute.

Drunkenness of a party, to relieve him from a contract, must have been such at its execution that he did not know what he was doing; it must have been such as to suspend the use of reason and understanding.

Rule to show cause why Committee of Defendant should not pay the judgment.

January 21st, 1897. BITTENGER, P. J.—The defendant in the above judgment, Herman Meyer, is an habitual drunkard having been duly found such by inquisition on the 12th day of September, 1895. After the confirmation of the inquisition by the Court, The Security, Title and Trust Company, of York, Pa., was appointed Committee of said Herman Meyer, and has charge of his estate, which consists of real estate situate in the City of York, and is more than sufficient to pay the above judgment, interest, costs and attorney's commissions for collection. It does not appear that any other indebtedness exists against him.

The judgment bond set out in the plaintiff's petition, is dated the 15th day of June, 1894, and contains a warrant of attorney to enter judgment, upon which judgment was entered on the 1st day of June, 1896. After the alleged execution of said judgment note, to the plaintiff, the defendant, Herman Meyer, made a voluntary assignment of all his estate for the benefit of creditors, on the 14th day of September, 1894, and on the 22nd of April, 1896, his remaining estate was, by order of the Court, reconveyed to him. After said reconveyance, on the date before stated (June 1, 1896,) judgment was entered on said warrant, in this Court.

This rule, was on the 2nd day of June, 1896, granted by the Court, on the petition of the plaintiff. An answer was filed by the Committee on the 6th day of July, 1896, to said rule, praying for its discharge for the following reasons:

"That Herman Meyer denies that he signed, sealed or delivered the bond or note and warrant of attorney upon which the above judgment was entered.

That he, however, avers that he never received any value for the same and is not indebted to John Boner to the amount of said judgment or the value of anything.

That Herman Meyer has been, from the time of the death of his wife, more than four years ago, and up until a short time since, an habitual drunkard, which habit, in addition to his advanced age, (he being now about eighty years old,) rendered him frequently unconscious of what he did.

That if said bond or note and warrant of attorney was signed by him, it was done at a time when he was in the mental condition above described, and not conscious of what he was doing, and hence not responsible for what he did do."

The parties proceeded to take the testimony of witnesses, which was read to the Court upon the argument.

The entry of the judgment did not give the plaintiff any priority of lien upon defendant's real estate in the hands of his committee, nor could he issue execution thereon, as is clearly decided in Eckstein's Estate, 1 Pars. Eq. cases 58; Wright's Appeal, 10 Pa. 57; see also Bennett v. Hayden, 145 Pa. 586. In the case last cited, it is said by Chief Justice Paxson in the opinion, page 596: "The twentieth section of the act of 1836

enacts that "the committee of the estate of every person found to be a lunatic or habitual drunkard, as aforesaid, shall have the management of the real and personal estate of such person, and shall, from time to time, apply so much of the income thereof as shall be necessary, to the payment of his just debts and engagements, and the support and maintenance of such persons, and of his family, and for the education of his minor children." The twenty-first section provides that, "if the income of the estate of such person shall not be sufficient for the purposes aforesaid, it shall be lawful for the committee aforesaid, under the directions of the court, to apply so much of the principal of the personal estate as shall be necessary for the purpose." And by the twenty-second section: "If the personal estate of such lunatic or habitual drenkard shall not be sufficient for the purposes aforesaid, it shall be lawful for the Court of Common Pleas, having jurisdiction of the accounts of the committee of such person, to make an order authorizing such committee to sell at public sale, or mortgage, such parts of the same as the said court shall deem expedient." But "no order for the sale or mortgage of real estate, as aforesaid, shall be granted, unless it appear that due notice of the intended application was given to the wife, if any, and the next of kin of the lunatic or habitual drunkard capable of inheriting the estate." See twenty fourth section.

"The creditors of a lunatic, who obtain judgments after inquisition found, do not acquire thereby any right of priority over other creditors."

"The debts of a lunatic are to be paid according to their character or nature, at the time of the inquisition finding lunacy. Judgments and mortgages obtained during sanity, or before lunacy found are liens, and are entitled to a preference, but all other debts attach equally, and have equal claims of payment;" Wright's Appeal, 8 Pa. 57.

The manner of collecting claims against such estates in the hands of committees is indicated by Judge King in Eckstein's Estate, supra. "A creditor after an individual has been declared a lunatic, may bring his action in a court of law, and serve the process upon the committee, and have the amount thus ascertained, but cannot issue an execution to enforce the collection of a judgment. He must come into the Court of Common Pleas which is executing a control of the estate of such lunatic for the payment of a claim thus ascertained. If the claim is not disputed, the creditor may apply by petition to the court for an order upon the committee for its payment. But in disputed claims, the amount due must be first ascertained by a trial at law, and after a verdict and judgment, application should be made to the Court having the custody of the estate of such lunatic, for payment."

We have not had cited to us, nor have we found any such case as the one under consideration, where a note with a warrant of attorney was executed by a lunatic or habitual drunkard previous to the finding of the existence of the disability by the inquest, upon which judgment was entered after the appointment of a committee. Here there is a judgment entered on the warrant, and although the claim is disputed it does not appear appropriate or requisite to bring suit on the note, with service upon the committee and recover judgment. The inquisition does not find that disability of the defendant existed at any time before the finding of habitual drunkeness. It is not retrospective. Judgment is obtained by virtue of the warrant of attorney embraced in the note, and, certainly, no necessity exists for a suit for recovery of judgment. It is conclusive until opened or set aside.

The judgment is disputed, though no application has been made to have it opened. In this Court of Equity, however, the committee cannot be ordered to pay the judgment, if the evidence taken by the parties and submitted to the Court, establishes any ground for the opening of the judgment. The committee has been legally notified and is entitled to his day in court, and has the same as fully as if he were duly summoned, upon the note, in a suit to recover judgment.

If the evidence as a whole is sufficient to move a Chancellor to open the judgment for fraud, accident or mistake, these proceedings must fall—the rule must be discharged. If not, the rule should be made absolute and the committee ordered to raise, by the sale of the real estate of the defendant, legally declared by inquest an habitual drunkard, sufficient moneys

for payment of said judgment, and be ordered to pay the same.

The defendant in the judgment denies the execution of the note and warrant, but the great weight of the evidence establishes the fact that he signed the same. The subscribing witnesses Mrs. M. McIlvain, Mrs. Carrie Boner, and the plaintiff, all swear the defendant signed the note and warrant. Mrs. McIlvain is a disinterested witness. Besides an examination of the signature of the defendant to the test papers in evidence and a comparison of these signatures with that to the judgment note in question, establish the genuineness of the defendant's signature to this note and warrant. The testimony of the defendant, to the contrary, and that of his daughter, Annie Carr and her husband, John H. Carr, (the latter two to prove an alibi for the defendant at the time fixed by the plaintiff's witnesses as the time of the execution of the note and warrant,) fail to raise a doubt in our minds as to the genuineness of defendant's signature. In fact the testimony as to the claimed alibi does not cover the time of the execution of the paper.

The evidence entirely fails to show, as claimed by the defendant in the judgment, and on his behalf, that from habits of habitual drunkenness defendant was incapaciated for business at the date of the note and warrant, and for several years before. On the other hand it is shown that, notwithstanding his age and habits, he retained possession of his property and managed it until the 12th of September, 1894, some fifteen months after the note in question was signed by him. His daughter, Mrs. Annie Carr, on page 20 of defendant's testimony, testifies as follows: "He attended to his business pretty well all along. When he was sober no trouble, only when he was drunk."

The testimony of John Boner and his wife, Carrie, Mrs. McIlvain and also J. H. Carr, defendant's son-in-law, all is that the defendant was sober on the 15th day of June, 1894, the day the note was executed by him. Some three months afterwards he executed a deed of voluntary assignment for the benefit of his creditors, the validity of which was not questioned, upon which a portion of his real estate was sold and his debts paid, and afterwards a reconveyance of the remaining estate was made to him, as already stated. The burden of proof was upon the defendant to show incapacity to transact business at the time of his making his signature to the note and warrant; Noel v. Karper, 53 Pa. 97.

The law applicable to evidence of incapacity, from drunkenness of a party, to contract, at the time of making of the same, is stated by Kent in his Commentaries, Vol. 2, p. 451. "The rule formerly was that intoxication was no excuse, and created no privilege or plea in avoidance of a contract; but it is now settled, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable;" and it may be avoided by himself though the intoxication was voluntary and not procured by the circumvention of the other party.

Drunkenness of the party, to relieve him from the contract, must have been such at its execution, that he did not know what he was doing; it must have been such as to suspend the use of reason and understanding; Bush v. Breinig, 113 Pa. 310; see also Noel v. Karper, supra.

In this required proof of incapacity, the defendant has come short, and he has also failed to prove any fraud, accident or mistake sufficient to invoke equitable relief in the opening of the judgment.

The seal implies consideration and to avoid the judgment, to contradict the written instrument or to reform it, the proof must be clear, precise and indubitable. This principle is so universally recognized by the Supreme Court that it is not necessary to cite authorities to sustain it.

The weight of the evidence shows a valuable consideration for the note, in boarding furnished by the plaintiff, to the defendant, for a year or more, services of a disagreeable character, and moneys advanced, from time to time, all detailed in the evidence of the plaintiff, corroborated by his wife, by Mrs. Carrie Sheeler, Mrs. Caroline Clinker, and others. Herman Myers contents himself with the testimony, in general terms, that he never saw the note before, that he did not sign it, and that he did not owe the plaintiff anything. It is significant that he does not testify that he was drunk at the time of its execution; or incapable of under-

standing the act or its consequences; or that he was induced to sign the paper by fraud on the part of the plaintiff. He does not deny that he boarded with the plaintiff a year or more; from April 1893 to April 1894, the performance for him, by the plaintiff and his wife, of the disagreeable services testified to by them; or that the plaintiff gave him different sums of money testified to by the plaintiff and his witnesses. He does not specifically deny the receipt of any of the different sums of money sworn to by the plaintiff, as to a portion of which he is corroborated by other witnesses; nor does the defendant testify, that he at any time, paid to the plaintiff, the amount claimed by the plaintiff as making up the amount of money embraced in the judgment.

When judgment notes are not clearly shown to have been obtained by fraud, accident or mistake, or by undue influence upon aged or mentally weak persons, by undue influence exercised by persons occupying confidential relations, as instanced in Miskey's Appeal, 107 Pa 611, established by clear, precise and indubitable proof, the court will not open the judgment and let the defendant into a defence. Here instead of the defendant showing by the required proof, want of consideration, the defendant's signature is under seal, importing consideration, and the evidence of the plaintiff shows legal consideration for the note and warrant.

There is an entire absence, in the case, of proof, demanding and requiring the exercise of the equitable power of the court, in the opening of the judgment and the submission of the matter to a jury.

Hence the judgment stands as conclusive upon the defendant, and equity and fair dealing require that the amount be paid out of the estate of the defendant in the hands of his committee.

The rule is made absolute; and the committee of the defendant, The Security, Title and Trust Company, of York, Pa., is ordered and directed to pay to the plaintiff out of the estate of defendant in its hands, the amount of said judgment, debt, interest, and costs and Attorney's Commissions; and if requisite the said Security, Title and Trust Company is authorized and required to raise a sufficient sum to make the said payment hereby ordered and directed, by a sale of the real estate of said Herman Meyer in the hands of his said committee, upon proper application to the court on notice, to realize a sufficient sum to make said payment, hereby ordered and directed.

Miller v. The Iron City Mutual Fire Insurance Co.

Insurance—Proofs— Appraisement - Policy.

The affidavit of defence alleged that plaintiff never furnished defendant company with complete proofs of the loss as required by the conditions of the policy; but failed to aver wherein they were deficient. HELD, that as defendant company failed to notify plaintiff of such deficiency, such defects must be considrded as waived, and the affidavit of defence is insufficient.

The affidavit of defence further averred that no satisfactory proof of loss was furnished and no appraisement made, and hence the action was prematurely brought. HELD, that as an appraisement is only necessary when there has been a disagreement, this is not a sufficient ground of defence.

It is not a sufficient ground of defence that the copy of policy served with plaintiff's statement is not an exact copy—or a *fac simile*—of the policy in suit, if it be a copy.

An averment "denying that it was a total loss under the terms of the policy," is insufficient.

Rule for judgment for want of a sufficient affidavit of defence.

The plaintiff's statement was as follows:

The plaintiff, William L. Miller, claims of the defendant, The Iron City Mutual Fire Insurance Company of Pittsburgh, Pennsylvania, the sum of nine hundred dollars with interest from November 28, 1896, according to a certain policy of insurance, in writing, executed and delivered to the plaintiff by defendant on or about the 30th day of July, 1896, at Erneys, Penna. Said policy was delivered in consideration of the sum of four dollars and fifty cents paid by the plaintiff to the defendant, the receipt whereof was in said policy acknowledged. A copy of said policy is hereto attached and made part hereof The plaintiff avers that he has performed all things on his part to be performed; but that the defendant has broken its covenants on its part to be performed in this. That on the 20th of

August, A. D. 1896, the building and all things contained therein on the premises in said policy of insurance mentioned were destroyed by fire, which did not happen by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by the neglect of the insured to use all reasonable means to save and preserve the property at and after said fire or when the property was endangered by fire in neighboring premises. Nor was the building used for the purpose of carrying on any trade or business, except that for which it was insured, as described in said policy. And that on the 27th day of August, 1896, the plaintiff gave notice to the defendant of the fire and loss and on or about the 28th day of September, 1896, did deliver to the defendant a particular account of plaintiff's loss and damage and also of the value of the premises insured, and when and how the fire originated to the best of plaintiff's knowledge, and that was verified by his oath, attested by R P. Strominger, Esq., a Justice of the Peace in and for York County, Penna., that he had sustained a loss or damage upon the premises insured to the sum of nine hundred dollars; yet the defendant has not paid to the plaintiff the said sum of money by it insured, nor repaid nor reimbursed him for the loss sustained by the said fire or any part thereof although so requested, contrary to the form and effect of the policy of insurance aforesaid.

Therefore the amount claimed by the plaintiff from the defendant is the sum of nine hundred dollars with interest from the 28th day of November, 1896. And that there are no items of credit due the defendant, nor any set-off applicable to said claim by the defendant. Nor is the defendant entitled to make any claim to any credit or set-off upon said policy

That the defendant though requested so to do has refused and still doth refuse to pay the same or any part thereof to the great damage of the plaintiff. Therefore he brings this suit.

The affidavit of defence avers:

1st. The policy upon which suit is brought provides as follows—lines 67 to 76 inclusive:—"If fire occur the insured shall give immediate notice of any loss thereby in writing to this Company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same. stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon, &c., &c.,&c." The plaintiff in this case never furnished defendant company with complete proofs of loss as required by said conditions of policy.

2nd. By-Laws referred to on said policy provide as follows—9th paragraph:—"Losses shall not become due and payable until ninety days after the notice, as certainment, estimate and satisfactory proof of the loss herein required have been received by the Company. including an award by appraisers, unless waived by Company in writing."—that no award of appraisers having been made, and no waiver by defendant Company in writing, this action is prematurely brought.

The defendant company denies that the copy of policy served with the copy of plaintiff's statement of claim in this case is an exact copy of the policy issued to the plaintiff in this case.

The defendant Company denies that it was a total loss under the terms of its policy.

John N. Logan for rule.

E. W Spangler, contra.

July 5th, 1897. STEWART, J.—This is an action of assumpsit on a policy of insurance, issued by the defendant company to the plaintiff, in the sum of nine hundred dollars, dated July 29th, 1896, insuring him against loss or damage by fire. The risk covered was a blacksmith and wagon-maker shop and tools and materials therein. The plaintiff's statement avers a total loss occurring, not under the excepted clauses of the policy, on August 20, 1896, and that notice was given of the loss on August 27th, 1896, to the Company defendant, and that on or about September 28, 1896, the plaintiff delivered to the defendant a particu-

lar account of plaintiff's loss and damage, and of the value of the premises insured and how the fire originated to the best of plaintiff's knowledge, and that he had sustained loss or damage to the amount of $900, the total amount of the risk verified by his oath. The plaintiff further avers generally that he has performed all things on his part to be performed.

The affidavit of defence, after alleging a full and legal defence to the whole of the plaintiff's claim, sets out certain provisions of the policy to be observed in case of fire, and then avers as the first ground of defence, a further provision as follows: "And within sixty days after the fire unless such time is extended in writing by the Company (the insured) shall render a statement to this Company signed and sworn to by said insured, stating the knowledge of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cost of each item thereof and the amount of loss thereon, &c., &c., &c.;" "the plaintiff in this case never furnished defendant Company with complete proofs of loss as required by said conditions of said policy."

Is this allegation sufficient to stop judgment? Boiled down it amounts only to an allegation that the plaintiff never furnished defendant Company with complete proofs of loss as required by the conditions of the policy. It does not deny that proofs were furnished but only that *complete* proofs as required by said conditions of said policy were not furnished. Wherein they were incomplete, or to what conditions of the policy they did not conform is not disclosed. Proofs were furnished; this is not denied. Were they rejected or returned or the plaintiff informed of their insufficiency? On this subject also the affidavit of defence is silent. If they were insufficient it was the Company's duty to return them specifying the supposed defects; Carpenter v. Insurance Company, 156 Pa. 37.

For the purpose of this motion I must assume that the proofs received by the defendant were furnished by the plaintiff in good faith, intending to comply with the requirements of the policy; and if they were insufficient it was the duty of the defendant to promptly say so, specifying wherein they were deficient and a failure to do so is a waiver of such defects; Gould v. Dwelling-House Ins. Co., 134 Pa. 570; Davis Shoe Co. v. Kittanning Ins. Co. 138 Pa. 73; Welsh v. London Assurance Co., 157 Pa. 507.

Had the defendant written the plaintiff what is contained in his affidavit of defence with reference to the insufficiency of the proofs objecting thereto on these grounds, it is doubtful whether it would have been sufficient to put upon him the burden of furnishing additional proofs; Davis Shoe Co. v. Ins. Co., supra. These cases, I think sufficiently dispose of the question of the insufficiency of the proofs of loss.

The second ground of defence is: "Under the By-Laws: "Losses shall not become due and payable until ninety days after the notice and ascertainment, estimate and satisfactory proof of the loss herein required have been received by the Company including an award by Appraisers unless waived by the Company in writing," that no "appraisement" having been made and no waiver by the defendant Company "in writing, this action is prematurely brought." Stripped of its verbiage this means that no sufficient proofs of loss have been furnished, and no appraisement made, and therefore the suit is premature. The first position is disposed of by what was said as to the the preceding ground of defence, and as to the latter, an appraisement is only necessary when there has been a disagreement as to the amount of the loss, and it is not disclosed that prior to this suit there was such disagreement, nor any offer on the part of the Company to appoint an appraiser.

The third ground of defence is that the copy of policy served with the copy of plaintiff's statement of claim is not an exact copy of the policy issued to the plaintiff. The Act of 25th of May, 1887, P. L. 271 relating to the forms of action and pleading does not require the copy to be an "exact copy," nor a fac simile, but simply a copy. This portion of the affidavit is therefore evasive.

The fourth and last ground of defence is that the loss was not a total loss under the terms of the policy. What terms of the policy are referred to here is not disclosed, and the proposition involves a legal conclusion. Naked denials in an affidavit of defence are not sufficient, nor are legal conclusions. The facts should

be stated with sufficient detail to enable the Court to say whether they amount to a defence or not; Bank v. Stadelman, 153 Pa. 634.

On the whole, the affidavit of defence is insufficient and the rule for judgment is made absolute, the amount to be liquidated by the Prothnotary.

Milller & Son v. Weber et ux.

Judgment—Opening of—Married women.

The petition to open the judgment and the answer filed thereto raised a dispute as to how much is due and also whether such amount as may be found to be due is a debt for which a married woman is liable. This is sufficient to open the judgment and let both defendants into a defence.

Petition and rule to open judgment as to Philip Weber and let him into a defence and to strike off judgment as to Catharine Weber.

December 31st, 1896. STEWART, J.—The petition and answer filed in this case and the depositions taken in support of the allegations contained therein, raise a serious dispute as to how much is due upon the above judgment and also as to whether the amount which may be found to be due thereon is a debt for which Catharine Weber, a married woman, is liable. This being so is a sufficient reason for opening the judgment and letting both defendants into a defence.

Without deciding the disputed question of fact as to whether the goods for which the judgment note was given were purchased by the wife, I could strike her name off the record, and this question of fact is also for the jury.

The judgment is opened as to both defendants and an issue is awarded to try:

1st. What amount if anything is due on the said judgment, and,

2nd. Whether or not the goods for which said note was given, were sold to Catharine Weber.

In this issue A. Miller & Son shall be the plaintiffs and Philip Weber and Catharine Weber shall be the defendants; and no other pleadings are necessary.

C. P. of Monroe Co.

Reynolds v. The New York Wood Fibre Co. et al.

Statement of claim—Amendment—Rule to strike off judgment.

To entitle the plaintiff to judgment for want of an affidavit of defence, his statement of demand must be self-sustaining; a material amendment of the statement of demand will not be allowed after petition to strike off or open the judgment by default.

Rule to show cause why the judgment shall not be stricken off, or opened; also rule, or motion, to show cause why plaintiff may not be allowed to amend his statement.

Staples & Erdman for plaintiffs.

H. J. Steele for Kleinhans.

May 8th, 1897. CRAIG, P. J.—On the 29th of November, 1895, the plaintiff took judgment before the Prothonotary, against the defendants for their neglect to file an affidavit of defence at the time and in the manner prescribed by law. On the 9th of June, 1896, Daniel W. Kleinhans, one of the defendants, presented his petition to court, wherein after stating that he had no knowledge of the entry of the judgment until the 19th of May. 1896, he sets out at length his reasons for striking the judgment from the record, or for opening the same and letting him into a defence. On the same day (June 9th, 1896,) a rule was thereupon granted on the plaintiff to show cause why the judgment should not be stricken from the record, or be opened, and the petitioner let into a defence. On the 22nd of June, 1896, plaintiff by his counsel, came into court and moved for permisssion to amend his statement in the particulars enumerated. Whereupon, the same day, a rule to show cause why the amendment should not be allowed, was granted To the rule granted on the plaintiff, June 9, 1896, the plaintiff made answer June 15, 1896; and to the rule granted on the defendant Kleinhans' answer was made by him July 2, 1896. These two rules are now before us for disposition.

We have no doubt of our right to permit the amendment asked for by the plaintiff; Jones v. Gordon, 124 Pa. 263; Penna. and N. Y. R. R. v. Bunnell, 81 Pa. 414; North & Co. v. Yorke, 12 Mont. 211; Swatara S. B. and L. Ass. v. Foley, 2 Pearson 265. But the question is, can we and ought we allow the plaintiff to make the amendment, as against the defendant Kleinhans, without striking off or opening the judgment beforehand. To entitle the plaintiff to judgment for want of an affidavit of defence, his statement of demand must be self sustaining; Bank v. Ellis, 161 Pa. 241; Newbold v. Pennock,

154 Pa. 501; Com. v. Hoffman, 74 Pa. 105; Ide v. Booth, 8 C. C. 499. In Fritz v. Hathaway, 135 Pa. 274, it is said by Mitchell, J. that a "judgment for want of a sufficient affidavit of defence is, in effect, a judgment on demurrer, and, like all such judgments, must be self-sustaining on the face of the record." It is manifest from a reading of the amendment, that it is not a formal, but a material amendment of the statement of demand. It is in fact a perfecting of the statement, making thereby a legal cause of action. This, it seems to us, must be the construction of the plaintiff's motion to amend his statement of demand, after the defendant's petition to strike off or open the judgment by default. To allow this amendment to be made, and, at the same time, to refuse defendant's motion would be depriving him of a valuable right. Hence while we are disposed to exercise the liberality of the law in allowing the plaintiff to make his amendment, we must at the same time not deprive the defendant of his right, to wit: to answer the statement, as amended. This seems to be following the rule, as stated in Duffey v. Hontz, 105 Pa. 96; Leeds v. Lockwood, 84 Pa. 70; Kille v. Ege, 82 Pa. 102.

At the argument, the case of Swatara S. B. and L. Ass. v. Foley, supra, was referred to as ruling the plaintiff's contention. An examination of the case shows that it differs essentially from the case at bar. There the amendment was allowed after there had been a hearing on the merits and after an application to open and a credit allowed, and because the defect was not pointed out or complained of by the defendant until after judgment. In this case, we have no such condition of things. The ruling, therefore, does not apply.

The rule to strike off the judgment by default against the defendant, Kleinhans, is made absolute; and, at the same time, the motion or rule of the plaintiff to amend his statement is allowed and made absolute. These rulings are to be without prejudice to the plaintiff's judgment against the remaining defendants.

QUARTER SESSIONS.

Road in Fawn and Peachbottom Townships.
Vacation—"Burdensome"—Petition

The petition set forth that the road had become "useless, inconvenient and burdensome." HELD, that in the absence of any facts to support this allegation, the order to view should not have been granted.

Such a petition must set forth in a clear and distinct manner the situation and other circumstances of that part of the road desired to be vacated.

The viewers found that the part to be vacated "will be useless, inconvenient and burdensome, when the road laid out as heretofore mentioned will have been opened." HELD, that this was equivalent to finding that the old road had not become useless, and the proceeding will be set aside.

Exceptions to report of viewers.

The petition in this case was as follows:

That a public road was long since laid out and opened leading from York, in said county, to the Village of Dublin, in Harford county, Maryland, and known as the "York and Dublin Road;" that a part of said road beginning at a point in Peachbottom township, where the public road leading from said "York and Dublin Road" to Byransville and known as the "South Side Road" intersects the said "York and Dublin Road" at lands of G. S. Murphy, and Theophilus Jones, and ending at a point on said last mentioned road, in Fawn township, where the public road known as the "Bald Eagle Road" intersects the said "York and Dublin Road" at the lands now owned by Arthur King formerly by Wm. Ilgenfritz, deceased, has become useless, inconvenient and burdensome and that the said road would be much improved by a change of its route between said points.

Your petitioners, therefore, pray your Honorable Court to appoint qualified persons to view the premises and to inquire into the expediency of making said change, and otherwise to proceed as directed by law. And they will ever pray, &c.

Ross & Brenneman for exceptions.

Cochran & Williams, for report.

June 21st, 1897. STEWART, J.—The order to view this road was improvidently granted, there having been no sufficient facts alleged in the petition to justify the Court in granting the order. The order was to vacate and change, and the only

allegation to support this was that the part of the road purposed to be vacated had become useless, inconvenient and burdensome.

No facts were stated in the petition to support this allegation, and such were essential and their omission fatal.

Proceedings to vacate and change a road are had under Section 18 of the Act of 13th of June, 1835, Br. Purd. Dig. p. 1883, pl. 62 which gives the authority and the 23rd Section of the same act, same book and page, pl. 66, which prescribes the requisites of the application. These are that it shall be signed by the applicants and shall set forth in a clear and distinct manner the situation and other circumstances of that part of the road desired to be vacated. This was not done in this case and the report of the viewers does not supply the defect. The proceedings, therefore, petition and report, are irregular and erroneous, and must be set aside; Road in Ross township, 36 Pa. 87.

Further, the petition alleged that the part of the road proposed to be vacated "has become useless, inconvenient and burdensome." The report of the viewers found "that the same in our opinion will be useless, inconvenient and burdensome when the road laid out as heretofore mentioned will have been opened." This is not a finding of the truth of the allegation in the petition, but rather the contrary and would be insufficient to support the report, had it had a proper foundation to stand upon. It is equivalent to finding that the old road has not become useless, inconvenient and burdensome, and therefore the conclusion of the viewers should have been against the change. The 6th exception is therefore sustained, and proceedings are set aside.

In re College Avenue Bridge.

Bridges— Appointment of viewers—Approval.

A petition asking for the appointment of viewers to report on a bridge failed to embrace the contracts for building the same, or copies thereof, or the substance thereof. HELD, to be a fatal omission.

Such viewers are under oath to determine whether the bridge has been constructed according to contract, and to enable them to perform those exacting duties intelligently, manifestly they must have before them the full contracts under which the work was done.

An estimate of the cost should be made a part of the order to view, since the cost of erecting the bridge may not exceed such estimate.

The Court will refuse to confirm a report of viewers on a bridge until satisfied by competent evidence that the bridge, as constructed, is sufficiently strong and safe for public use as a county bridge.

Report of viewers.

A petition was presented for the appointment of viewers to report whether the College Avenue Bridge had been constructed and completed according to contract.

Ross & Brenneman for petition.

June 21st, 1897. STEWART, J.—This is an application for the appointment of three viewers to view and report whether College Avenue Bridge has been constructed and completed according to contract. The petition is presented by the present Commissioners of York County, and avers the making of the contracts by their predecessors—two with Lemon Love for the iron superstructure for the round sum of $15,000 and $25,000 respectively; two with John Kisner and Daniel Lehman for the mason work, at $6 25 per cubic yard; and one with William Gruver for the grading and filling for the sum of $300.

It is alleged that the bridge is now completed agreeably to the contracts. The petition does not embrace the contracts themselves, nor copies of them, nor the substance of them, nor state whether they were written or verbal This we think is essential to a proper discharge of their duties by the viewers, as well as for the information of the Court who are to approve their report, until which time the money is not due and payable. If the contracts are in writing, copies of them should be embraced in the petition; if not, then the substance of the verbal contract should be set forth, but we can see no reason why such contracts should not be reduced to writing. It would avoid disputes and enable the Commissioners to put upon record these important transactions in which all citizens and tax-payers are interested.

The duties of such viewers are not merely perfunctory. They are to act under oath, to determine whether the bridge has been constructed according to contract, and if they shall not approve of the same, they shall report to the Court

what sum ought to be deducted from the sum stipulated in the contract.

"They shall also report in what respect such bridge is deficient and whether or not the same has occurred through the default, neglect or official misconduct of the Commissioners or any of them and what in their judgment is the value of such bridge." To enable them to perform these exacting duties intelligently, manifestly they must have before them the full contracts under which the work was done. As these contracts are not embraced in this petition, I shall decline to appoint viewers.

The law under which this view takes place is the 37th, 38th, 39th, 40th, 41st, 42nd and 43rd Sections of the Act of 13th of June, 1836, Br. Purd. Dig. p. 1891–2, and these sections should be embraced in and made part of the order to view, so that the viewers may fully understand their duties and powers in the premises.

In examining the record of this bridge, I do not find that the Commissioners procured an estimate of the cost thereof as required by the 36th Sec of the Act of June 13th, 1836, Br. Purd. Dig. p. 1891, pl. 122.

This should have been done and such estimate also should be made a part of the order to view, since under the decisions, the cost of erecting the bridge may not exceed such estimate; Lehigh County v. Kleckner, 5 W. & S. 181, and the viewers have no means of knowing what the estimates were, or whether they have been exceeded unless such estimate or a copy thereof accompanies or is made a part of the order.

Upon the presentation of a petition conforming to this opinion, the Court will appoint viewers.

The Court's conditions having been complied with, the viewers were appointed and in due time presented their report, finding that the bridge was built according to contract, but that a stronger floor system should have been originally contracted for. Upon this question the Court ordered the taking of additional testimony, and finally disposed of the matter in the following opinion:

Ross & Brenneman, *Niles & Neff* and *J. S. Black* for report.

H. Keesey, contra.

August 23, 1897. BITTENGER, P. J.

—In the matter of the College Avenue Bridge over the Codorus Creek.

On the 2nd day of August, 1897, the inspectors appointed by the Court reported that they found the entire work of this bridge completed in accordance with the specifications and contract entered into with the County Commissioners. They also reported that from the evidence submitted to them by the Northern Central Railway Company, whose tracks are crossed by the bridge, that a stronger floor system should have been originally designed and contracted for by the County Commissioners.

We confirmed the report but refused to approve the bridge until satisfied by competent evidence that the said bridge, as constructed, is or has been made sufficiently strong and safe, in its floor system, for public use as a county bridge.

Evidence was afterwards taken on behalf of the contractors and the County Commissioners, and filed on the 6th day of August, instant, and a motion made by counsel for the approval of the bridge.

On the same day a rule was asked for by the Northern Central Railway Comp any to take testimony. The approval of the bridge was refused, to the end that a full hearing might be had of the matter in controversy; and a rule was granted to take testimony on behalf of the Railroad Company, having a special interest in the strength of the bridge over their tracks.

Upon hearing all the testimony it appears that the floor system of the bridge, over the Railroad, contains several lengths of eight beams under the planking, each capable of safely carrying a weight of two tons on the middle of each beam which will not break; based on an accepted scientific calculation, under a weight of four times of the said weight resting on the middle of any one of said beams; that a wagon passing over the bridge heavily loaded could not impose on one beam at its middle more than one-fourth of its load, even if it were possible to place its weight on the naked beams without planking; that the heavy planking distributes the weight between two and three beams and that therefore not more than one-half of the weight of such heavily loaded wagon could possibly be on at least two beams at their centre at one time. When the weight is upon such beam nearer its supports and

further from the centre the beam will sustain a relatively much greater weight.

The bridge is built to safely sustain the weight of two tons on each beam at its centre with an allowance of four as a factor of safety, without breaking, as is shown by the testimony.

The heaviest load proven to be placed on wagons in this neighborhood is the 7500 pounds of stone used on the York and Chanceford Turnpike. On these beams about 19 feet long there would rest such a wagon, its load and two of the horses, an aggregate weight of less than nine tons. One fourth of said weight could not be placed so as to rest on one of the said beams, at its middle, or even on two of them at their middle. The planking would distribute such weight to at least two of said beams, if not to and between three. If half of such weight of wagon, load and two horses be upon two or three of said beams at the same time, as we have seen, distributed between them by the planking, the weight would not be at their middle point but would be nearer their supports; and the beams would safely sustain their maximum weight, with the benefit of the allowance of four, before breaking.

The heaviest traction engine manufactured here weighs seven tons. With a storage of water for steam and coal both allowed for, on such traction engine, it is apparent that it is impossible to place such a weight in a traction engine upon any one beam of the bridge as to cause a breakage and accident. Besides it is proven that it is impossible to so densely pack the bridge with people standing so as to strain the bridge or break it down. That the heaviest road rollers made can safely cross it; that it is of the standard strength of bridges built all over the country for highway bridges.

It is proven that the effect of the smoke and steam of the engines passing under bridges is to corrode and eat the iron so as to weaken and destroy it in the course of years. Sometimes this injury is speedily done.

It is argued by the complainants that therefore the beams of the bridge over the rail road tracks should have been heavier. It is not shown that this was known to the Commissioners when the plans were made and the bridge was contracted for. Had it then been an ascertained fact, it would have been proper and requisite to have allowed for this injury to the beams and added to their size and strength.

The evidence however is that the bridge as constructed is sufficiently strong in its floor system. It will be the duty of the County Commissioners to protect the bridge by paint and such other means as may be feasible, from the injury caused by the steam and smoke to which the iron is certainly known to be subjected, and to replace the beams and other parts of said bridge when necessary from time to time.

Both duty and interest will compel the Railway Company to see that the bridge is kept strong and safe by the proper authorities.

From the evidence carefully weighed and considered we are forced to the conclusion that the bridge is not only completed strictly according to the contract, as reported by the inspectors, but that it is entirely safe for such travel and use as it will be called upon to sustain.

We therefore approve the said bridge.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Surety—Payment by—Subsequent defalcation— Voluntary payment.—A surety on a bond to the amount of $100 paid $60.50 for a defalcation of the agent for whom he was surety, the agent then being discharged. He was subsequently re-employed and defaulted to the amount of $119. An action being brought for the amount of the bond, the court instructed the jury that under the uncontradicted evidence the first payment of $60.50 was to be taken to have been in discharge of the bond to that extent and that the surety was therefore only liable for the balance of $39.50. On argument for a new trial, rule discharged.—*Metropolitan Life Ins. Co. v. Driess*, (Lehigh C. P.) 6 Northampton County Reporter 67.

York Legal Record.

Vol. XI OCTOBER, 1897. No. 4.

COMMON PLEAS.

C. P. of Lackawanna Co.

Maitland Driving Park Association v. Fisk.

Attachment—Act of 1869—Bond.

The bond authorized by the third section of the Act of 1869, is not like the special bail to dissolve provided for in cases of foreign attachment; so that while the action may thereafter proceed in a large measure as a personal action, the property attached is to be regarded as still in legal custody, the defendant by the condition of the bond upon a final recovery, being obliged to return the property in good condition or pay the debt. It is to this extent a forthcoming bond and not a bond to dissolve, and the defendant by giving it, is not to be held to have waived his right to contest the regularity of the proceedings.

An employe who appropriates the money of his employer fraudently, is none the less his debtor because of his dishonesty, and the employer should have all the remedies against his property which the law affords, without regard to the crime involved in the transaction; consequently an attacement will lie for money embezzled, the injured party having the right to waive the wrong and sue upon an implied assumpsit.

A employed B to conduct a dining and refreshment stand. B turned over to A what he claimed to be the receipts less expenses. A claimed that B had received more than he accounted for, and caused an attachment to issue under the Act of 1869; HELD, that in order to sustain the attachment A must establish with reasonable certainty that B had not turned over to him the amount he was entitled to, and that he had designedly and dishonestly retained the rest.

Rule to dissolve attachment.

O'Brien & Kelly and *G. D. Taylor* for rule.

E. C. Newcomb, contra.

August 16th, 1897. ARCHBALD, P. J, —The bond authorized by the third section of the fraudulent attachment act is not like the special bail to dissolve provided for in cases of foreign attachment; so that while the action may thereafter proceed in a large measure as a personal action; Brenner v. Moyer, 96 Pa. 274; the property attached is to be regarded as still in legal custody, the defendant by the condition of the bond, upon a final recovery, being obliged to return the property in good condition or pay the debt. In other words it is to this extent a forthcoming bond, and not a bond to dissolve, and the defendant by giving it is not to be held to have waived his right to contest the regularity of the proceedings; Drake on Attachment, sec. 331; 3 Amer. & Eng. Encycl. of Law, 2nd Ed. p. 231. He still has an interest to do so in relief of his obligation which he ought not to be compelled to forego. The present rule was therefore well taken.

A person who fraudulently appropriates the money of his employer is none the less his debtor because of his dishonesty; and the employer should have all the remedies against his property which the law affords, the same as in case of any other debt, without regard to the crime involved in the transaction. The truth is that until the statutes made it a criminal offence it stood as a civil wrong only to be redressed civilly if at all, and this feature of it has not been changed. It was accordingly consistently held in Farmers' National Bank v. Fonda, 65 Mich. 533, that an attachment will lie for money embezzled, the injured party having the right to waive the wrong and sue upon an implied assumpsit. In this view the attachment before us is theoretically correct, but the difficulty we experience is in sustaining it upon the merits. To do so we have virtually to find that the defendant has fraudulently embezzled the money claimed by the plaintiffs and this upon the evidence we are not prepared to do.

The facts are somewhat as follows: In October last the plaintiff association held a three days' fair at their Driving Park in Benton, and the defendant was employed to conduct a dining hall and refreshment stand there. He was to buy such provisions and practically employ such help as he thought necessary, accounting to the association for the results, and being allowed $25 for his services. The first day of the fair was only a time of getting the things together and realized nothing. The second day the defendant turned over $125 less $3 30 for express bills paid and $25 returned to him for payment of his help. The third day the receipts, according to his statement, were $176 75, all of which was retained by him to meet outstanding bills. This, with a few dollars realized from the things left over after the fair was closed, and a similar amount received for board

of horse, is all that the defendant undertakes to account for. The directors of the association claim that he must have received from $125 to $150 more and hence the present suit. The way the latter amount is made out is by taking the things purchased as shown by the bills and calculating the probable profit upon them; so many cigars purchased at such and such a price and sold at a certain advance would realize so much; so many bags of peanuts at five cents a cupful would amount to so much more; so many hams cut into sandwiches at ten cents a sandwhich would amount to such another sum; so many pounds of meat and other provisions ought to afford so many meals for so many persons, which at so much per meal must have brought in so much further. In this way the directors, immediately after the fair, at a meeting at which the defendant was present, persuaded themselves that he had not rendered a true account and pressed him for a settlement. We will not attempt to follow the details of this figuring (although we may have occasion to refer to some of it further on) in part because it has only very vaguely been given to us but in part also because it is inconclusive upon the present contention; it is equally consistent, even if accepted in all its force, with mismanagement on the part of Mr. Fisk, as it is with a fraudulent appropriation by him of moneys received and unaccounted for. The association to sustain its attachment is called upon to establish with some reasonable certainty that he really took in more than he turned over to them, designedly and dishonestly pocketing the rest. This we do not think they have done.

It will be said, however, that there are several suspicious circumstances which tend in this direction; for instance, the meal tickets which the defendant failed to keep a precise account of. These tickets seem to have been used not to keep track of how many meals were served, but as vouchers to the parties who got meals to show to the person at the doorway that their meals had been paid for. If it was intended to have them operate also as a check upon Mr. Fisk, a very clumsy way was taken of doing so. All of the five hundred which had been printed were turned over to him each day in a bunch in the five packages into which they had been made up, so that when he came to account for the number of meals served, it depended upon his mere say so as to how many he should be charged with. He could come with a bunch of so many in one hand, representing them as the ones which were used, and a bunch of the rest in the other, as those which had not been, and no one would be able to successfully assert to the contrary. The association should have had some one independent of Mr. Fisk to stand at the door and take up the tickets, and then there would have been no question or controversy such as we now have. This would have been a business course; but instead of it, they relied on his management and honesty, and without satisfactory proof to the contrary we cannot be expected to do less.

But again it is said the defendant turned in the order which he had cashed for Willie Jones after he had already once gotten credit for it. If this was intentionally done it was a very awkward performance, because it was bound to be immediately found out. We must rather take it as a mistake due to the fact that it had been charged by the defendant on his books at the same time the order itself was retained as a voucher, and thus the account and the order made to duplicate each other in the settlement. But it is said the same attempt was made with the bill of four dollars for oysters bought from W. H. Pierce. When confidence has once been disturbed each instance of any peculiarity becomes an object of suspicion, and that is the case here. To the directors it seems no doubt like an effort to get twice paid for the same bill, but the defendant explains it the same as the other, as a mistake, and we are not persuaded that it was anything more. It was too patent a double charge to have been designedly made.

The plaintiffs also point to the offer which they made to have an expert go over the accounts and abide by his conclusions, which the defendant declined to agree to. This may have seemed a fair proposition, but the defendant was not bound to accept it. He asserted that he had paid over all he had received, and if this were so, he might well decline to have any one figure him out in debt according to methods suggested by the directors. Nor can we see anything of

significance in the proposition made by the defendant to turn over his stock in the association to settle. A man may always buy his peace without its counting against him. Besides this offer was subsequently withdrawn.

There are many things on the other hand which make in favor of the defendant. In the first place it is not to be lost sight of that the undertaking of which he had charge was financially a success. It may not have made all that the directors anticipated, nor all that it should have made with careful management, but it did not fall behind.

(Here follows a statement showing net profits of $40.80.)

In addition to this the table is to be credited with about one hundred meals furnished to judges, thicket men, directors and their families and other assistants, which at fifteen cents, the probable cost per meal, would raise the profits to about $56. Considering the large amount paid for help—some $44 outside of the $25 given to the defendant for superintending—this is not a little. It would also have been $7.63 more had not the mistake as to Saturday been made. These profits disappear in the account with Mr. Fisk by reason of a couple of matters turned in by him, but they are not on that account to be lost sight of. Thus he furnished 2,500 pounds of hay at $19 for general use on the grounds, he also paid the order of Willie Jones some $14.45 more, both of which items, amounting altogether to $33.45, would otherwise have had to come out of the general receipts of the fair.

These results are reached, however, it must be confessed, on the basis that, as returned by the defendant, but 269 paid dinners were had. The directors contend that there must have been many more. Mr. Potter says that 345 pounds of meat which went into the dining room ought, with other provisions, to have fed 800. Mr. Austin thinks they might have fed 500. There is a wide discrepancy between these two estimates, which of itself warns us that we are treading on very uncertain ground. Their entire unreliabilty may be shown by a moment's consideration. Calculating that the dining tables held thirty persons when every seat was occupied, and that as fast as one person was through another took his place, and allowing on this basis that 60 dinners could be served in an hour, to feed 800 people it would take between thirteen and fourteen hours, and if half were fed each day, with the dinner hour beginning at 11, it would have to continue without cessation until five or six o'clock, the last comers having to wait for their noonday meal until the shades of evening had doubled their hunger. The estimate of 500 does not lead to as great absurdities, but it does not give anything safe to adopt. We have assumed that 60 people could be fed in an hour—a tableful of 30 every thirty minutes—but this is pushing things to the extreme. After the first one or two tablefuls the number would necessarily fluctuate, some eating longer and some shorter, and vacant places here and there being left unoccupied, and after the first crowd is fed the rest straggle along. Fifty an hour therefore, is a very large average, and yet with that as a basis it would take five full active and busy hours each day to provide for even 500. But people will not wait that time to be served; if they cannot be helped with reasonable dispatch they will take care of themselves in some other way. Those who are to be fed gratis may be willing to wait, but not those who are to pay for it. It is not according to the probabilities, therefore, that even 500 people ate and paid for their dinners upon the occasion in question.

The defendant says that 269 dinner tickets were taken up in the two days, 137 the first day and 132 the second, and in this he is confirmed by Earl Carpenter, who stood at the door to receive them. The complimentary, or free dinners, must have amounted to about 100 more; that is to say, 22 or 23 judges, 8 or 10 police or ticket-men, 8 or 10 to help, and 7 or 8 directors and their families; or about 50 each day. This makes a total of say 369 people fed, which at an average of 50 an hour, would take about seven hours and a half, or three and three-quarters hours daily; or strung along as they would be at the end, say about four hours. With dinner started at 11 this would make it last until 3, or beginning at 12 it would not be finally concluded until 4 o'clock. These are about the hours given by the ladies who assisted in washing up the dishes and waiting on the on the guests, some of them fixing the

close of the meal considerably earlier. The number returned by the defendant is thus not only sustained by the weight of the evidence, but it comports entirely with the probabilities, while the estimates on the other side are extravagant and unreliable.

As to the estimated profits on things sold at the cigar and refreshment stand, we have little to say. As already observed, the figures of the directors have not been given us except in the most general way, and at the best they proceed upon hypothetical and uncertain grounds. They are contradicted moreover by such positive evidence as we have on the subject. The money as it was received was put for convenience into two or three cigar boxes, and at night was gath red up and counted. This latter was done, not by the defendant, but by Davidson and Carpenter, who turned over to him what they took out. Unless, therefore, some one abstracted money from the boxes during the day, the amount found there at night is to be taken as the amount actually received. There is of course, no evidence of any such theft nor of any opportunity for it. If Mr. Fisk had taken in the money himself, or if he had gathered it up at night, there might be some grounds perhaps for suspicion; but he did neither. The honesty of the returns rests really with Davidson and Carpenter, and in the face of what they jointly testify I do not see how we can refuse to accept them as correct.

With this conclusion reached, the defendant appears to have fully accounted for all that he could be required to.

(Here follows another statement, showing balance due defendant of $1 05.)

This brings the association slightly in the defendant's debt, and leaves nothing except suspicious speculation to the contrary on which the attachment can stand It may be that upon a final hearing some of these matters will show up differently, and if there was anything open for serious controversy it might be our duty to preserve the status quo and let the questions involved be passed upon by a jury. But the case in all probability has been as fully developed as it ever will be, and inasmuch as we could hardly sustain a verdict against the defendant as it is now presented, we feel that we must dissolve the writ. That we should not seem to do so unadvisedly, we have discussed the evidence somewhat more fully than we otherwise should, but it cannot now be said that we have not considered it in all its parts.

The rule is made absolute and the attachment is dissolved.

C. P. of Luzerne Co.

Van Horn v. A. Lewis Lumber Manufacturing Co.

Wages—Statute of frauds.

Where an employee, working for wages for a company, permits an independent merchant to supply him or members of his family with groceries, and, on settlement with his employer, permits the goods to be paid for out of his wages, he cannot afterwards repudiate his liability and claim his wages without deduction.

Where goods are sold upon the original credit of A. though delivered to B, the contract does not fall within the statute of frauds.

Rule by defendant to show cause why new trial should not be granted.

Huslander & Vosburg for plaintiff

Wheaton, Darling & Woodward for defendant.

May 3, 1897. BENNETT, J.—This is an action to recover wages alleged to be due the plaintiff for the services of the former and of his minor son, Joseph Van Horn, at so much per day, for a certain number of days during the period from September, 1894 to February, 1895, inclusive, in the business of lumbering, &c., in which the defendant was engaged.

The defendant was connected in business with the Harvey's Lake Supply Company, which furnished groceries and provisions to the men employed by the former, and made monthly assignments to the defendant of bills for provisions furnished, and the defendant deducted these bills from the wages earned by its employees trading at the supply store. The number of days of service rendered by the plaintiff and his minor son, as also the price per day for such service, were admitted by the defendant. It also appeared on the trial, by the uncontradicted testimony, that the plaintiff's eldest son, John Van Horn, worked for the defendant during the same time as did the plaintiff and his minor son Joseph, and that these three, together with the plaintiff's wife and daughter, occupied a house near by during that period, and lived, in part at least, upon provisions furnished by the supply company.

The plaintiff claimed the right to re-

cover for the total services of himself and minor son, less certain amounts admitted to have been received in cash on account of services for the months of September and October. The defendant claimed to have paid the plaintiff in full—first, by actual settlements for the months of September and October, in which it was alleged it deducted the plaintiff's and the minor's portions of the store account from their wages and paid the balances due them by check upon which they drew their moneys; and, second, for the months succeeding October, by off-setting, with the assent of plaintiff, his and his minor son's portions of the store account, as recognized by him, which were assigned to the defendant, and exceeded the wages earned.

The defendant produced evidence tending to prove the truth of its claim as above indicated, and in connection with that evidence there was also testimony in its behalf, tending to show that the same course of dealing and payment with the elder son, John Van Horn, was pursued. The plaintiff produced counter testimony bearing upon the matters above stated, and there was evidence upon the question whether the plaintiff was the head of the family and whether the goods were furnished on the credit of the plaintiffs and his sons, as claimed by the defendant, or whether John Van Horn, aided by his mother and sister, boarded the plaintiff and the minor son, and the goods were furnished exclusively on the credit of John, as claimed by the plaintiff.

We charged the jury, in substance, that if under the evidence given in behalf of the defendant, they found that the plaintiff's conduct fairly signified to the defendant, during the time of the former's employment, his assent to being charged with the goods furnished by the supply company and the deductions from the wages of himself and minor son, he could not, after the goods had been furnished, repudiate his liability and claim his wages without deductions; but if they found no such assent he was entitled to recover. The jury were fully justified, under the evidence, in finding the assent on the part of the plaintiff. The main reason urged for a new trial is, that we, in effect, as argued for the plaintiff, allowed the jury to charge the plaintiff with the debt of John Van Horn, contrary to the provisions of the Act of April 26, 1855, section 1, P. L. 308, requiring promises to answer for the debt of another to be in writing. But the plaintiff's assent to being charged with the goods has simply forced him to liquidate his own debt, and he has not been compelled to answer for or pay the debt of another.

The rule for a new trial is discharged.

McNair v. Rupp.

Appeal—Affidavit—Act of 1897.

Defendant appealed from the judgment of an Alderman one week after the approval of the Act of July 14, 1897, P. L. 271, which provides that "no appeal shall be entertained from the judgment of a Justice of the Peace or Alderman, unless the appellant or his attorney or agent shall make affidavit that the appeal is not for delay but because he verily believes that injustice has been done," without filing such affidavit. HELD, that he will be permitted to perfect his appeal.

The Act is not unreasonable in its requirements, and will doubtless have beneficial effect in preventing the taking of unfounded appeals.

The Supreme Court has allowed defective appeals to be perfected in all cases where there has been a *bona fide* effort to comply with the requirements of the law and where the same was not the result of negligence of the appellant.

The fact that the very existence of the Act was unknown to the Alderman or the appellant, was not on the statute book, and probably not on file in the Prothonotary's office, makes it a case where the existence of such ignorance will affect a judicial decision.

In this auspicious day of light, reason, liberty and justice our courts cannot be made parties to the commission of acts of hardship and oppression; and therefore the rule to show cause why this appeal should not be perfected is made absolute.

Rule to strike off appeal and rule to perfect appeal.

H. S. McNair for plaintiff.

D. K. Trimmer for defendant.

October 11th, 1897. BITTENGER, P. J. —The appeal in this case was taken on the 21st day of July, 1897, and the same was filed August 14th following. It is defective on account of non compliance with the Act of Assembly approved the 14th of July, 1897, P. L. 271, which provides: "That from and after the first

day of July, one thousand eight hundred and ninety-seven, no appeal shall be entertained from the judgment of a Justice of the Peace or Alderman, unless the appellant or his attorney or agent shall make affidavit that the appeal is not for delay but because he verily believes that injustice has been done;" P L. 271.

Both the above rules were taken September 27, 1897, and argued together.

Before the passage of the Act of March 22. 1872 P. L. 48, providing that "in all appeals from all judgments of Justices of the Peace, for wages the party appellant, his agent or attorney, shall make oath or affirmation that it is not for the purpose of delay that such appeal is entered, but because he firmly believes that injustice has been done," no such affidavit was required in appeals from the judgments of Aldermen and Justices of the Peace:

The act in question aims at placing all such appeals on an equality, and aside from its retroactive character, is to be commended as a desirable improvement in the law. It is not unreasonable in its requirements and will doubtless have a beneficial effect in preventing the taking of unfounded appeals It is not entirely clear, inasmuch as it gives room in its language for construction such as is advanced by the counsel for the plaintiff, viz: that the appeal shall not be entertained by the court. We think the proper construction is, however, that the Justice or Alderman shall not entertain or grant an appeal until the appellant make and file the required affidavit, in the sense of allowed, maintained, or supported, though the word entertained does not seem strictly appropriate, or well chosen.

This appeal was taken within a short period from the approval of the Act and before the same had been published in pamphlet form, and perhaps before a copy had been filed in the Prothonotary's Office. The existence of the law was not known to the appellant and very apparently, not by the Alderman who rendered the judgment.

The law favors trial by jury, and generally in decision of questions of want of proper recognizances and affidavits required in appeals from judgments of inferior courts, the Supreme Court has allowed defective appeals to be perfected in all cases where there has been a *bona fide* effort to comply with the requirements of the law and where the same was not the result of negligence of the appellant. So in cases where the party appealing had been led into error by the act of the Justice. In case of good faith by the party appealing, and also errors traceable to the act of the magistrate, when relief was asked without improper delay, relief has always been accorded by the courts, as was done both in relation to an affidavit and recognizance in an appeal from a judgment on a claim for wages for manual labor under the Act of 1872, already referred to, in Womelsdorf v. Heifner, 104 Pa. 1.

In cases of wilful neglect by the appellant and delay in application for relief; McElheny v. Holland, 111 Pa. 634, and Cressman v Bossing, 9 Atl. Rep. 191, the perfecting of the appeal was refused. In Heindel v. Bruau, 8 YORK LEGAL RECORD 141, we followed the last cited cases because there was a delay of three years before application was made to the court, and the neglect of the appellant to enter into a proper recognizance in the appeal from the justice's judgment for wages was the fault of the appellant who had his counsel present at the hearing.

The distinguishing feature of the case under consideration from that of the last quoted case is that in this case, the very existence of the law then but recently passed and not published or prescribed, was unknown to the Alderman and the appellant, alike, and that in this case the petition for relief was promptly made to the court. If there is any fault, it was that of the Alderman who in ignorance of the law improperly prepared and had the appellant make the appeal and not in the appellant who confidingly followed the form prepared by the Alderman.

It is argued, however, that ignorance of the law excuses no one. The maxim *ignorantia neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed; Brock v. Weiss, 44 N. J L. Rep. 241.

Beasly, Chief Justice, in the opinion in said case, says: "It is true the law will not permit the excuse of the law to be pleaded for the purpose of exempting persons from damages for breach of contract, or from punishment for crimes committed by them, but on other occasions

and for other purposes it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision."

This is assuredly a case in which the ignorance of the very existence of the act of assembly in question, not yet on the statute books, or in all probability, on file in the Prothonotary's Office, on both the part of the Alderman and the appellant, in which the equitable principle enunciated by the New Jersey Court of Errors and Appeals should prevail. There was no wilful neglect by the appellant, and the Alderman, on account of his ignorance of the passage and existence of the Act of July, 1897, erroneously made the record for the appeal to be taken, embracing the recognizance, and omitting entirely the required affidavit; and thus, though unintentionally, misled the appellant in taking the appeal.

There is no injustice or hardship in permitting the appeal to be perfected by filing of the required affidavit. No injury can result to the plaintiff by this action. The only inconvenience to him will be a trial in court where he will have his day, and prevail against the defendant if he has substantial ground of action. If he has not a legal cause of action he will not and ought not succeed. If we deny the prayer of the defendant, he will be turned out of court without any relief, and left only to pay the judgment rendered by the Alderman, which he declares to be unjust; and this because he failed to comply with an act of assembly at the time of taking the appeal, not yet published and indeed with the ink with which it was printed scarcely dry.

To deny the appellant the right to perfect his appeal and give him a day in court, where he may have a jury of his countrymen to adjudicate his cause, as he if entitled, by constitutional right; would be going back to the barbarism of Caligula In regard to the publication of the laws and their going into effect, Blackstone in Vol. 1 of his Commentaries, page 46, says: "Yet, whatever way it is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making the laws *Ex post facto;* when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime and inflicts punishment upon the person who committed it. Here it was impossible that a party could forsee that action, innocent when it was done, should be afterwards converted to guilt by subsequent laws; he had therefore no cause to abstain from it; and all punishment for not abstaining, must of consequence be cruel and unjust. All laws should be therefore made to commence *in future* and be notified before their comencement; which is implied in the term *prescribed*."

The act in question aims to be a retroactive law, so justly condemned. In this auspicious day of light, reason, liberty and justice our courts cannot be made parties to the commission of acts of hardship and oppression; and therefore we must make the rule to show cause why this appeal should not be perfected absolute and discharge the rule to strike it off.

It is so ordered and the affidavit offered by appellant is allowed to be filed.

Peach Bottom Railway Co. v. McAlister.

Railroad—Damages—Notice—Limitation.

Plaintiff located its road on defendant's land, filed its bond and asked for the appointment of viewers. The appointment was made, proceedings had and the report, finding no damages, filed and confirmed by the Court. Twenty-four years afterwards defendant moved to have the appointment stricken off and proceedings vacated. HELD, that he was not barred by any statute of limitations.

The company has no ownership of the land taken, but only an conditional right of way. Continued occupation of the land cannot confer ownership nor immunity from the payment of damages.

The fact that the road has changed hands, or that the collection of those damages would be an injustice to bond holders or innocent parties, would not be a bar to the proceedings, if the original view was improperly held.

The evidence showing that the notice of the view was served on the defendant's agent, the original proceedings are regular and the petition will be dismissed.

Petition for rule to show cause why appointment of viewers should not be stricken off, and all proceedings vacated and new viewers appointed.

Jno. H. Osmer & Sons and *James B. Ziegler* for petition.

Niles & Neff, contra.

October 11th, 1897. BITTENGER, P. J. —The Peach Bottom Railway (since merged into the York Southern Rail Road) having located their road and filed their bond as provided by the Act of Assembly in such case made and provided, on the 12th day of May, 1873, filed their petition for the appointment of viewers to view the premises and to assess the damages of John McAlister, above named, upon whose ground said road was partly located.

Viewers were appointed, and proceedings had, resulting in a report to the court, that said John McAlister has sustained and will sustain no damages, which report was filed July 12, 1873; and was afterwards duly confirmed.

The court, in this proceeding now before the court, is asked to strike off the appointment of the viewers and vacate all proceedings upon the said petition, and appoint new viewers; and this for the reason that ten days notice of the time and place of meeting of the viewers, was not given the petitioner, John McAlister, as required by the Act of Assembly and the order of view.

From the proof of notice attached to the report, it appears that the notice was served by leaving a copy with a member of the family of Morgan McDonald, the reputed agent of John McAlister, and by reading the notice to such member of the family, the said John McAlister being represented as absent from the county, permanently.

It is contended on behalf of the petitioner that the proof of service of notice shows an invalid service, upon its face, viz: upon a member of the family of McDonald an alleged agent, in the absence of the present petitioner from the county. He avers, under oath, in his petition that he had no notice served upon him, that McDonald was not his agent authorized to act for him at the time of the alleged service.

In the absence of proof we would be compelled to hold that no legal notice was served, in the proceeding, that the service is null and void, and that the petitioner is entitled to the relief prayed for.

The statute of limitations does not apply to bar this proceeding; Keller v. The Harrisburg & Potomac R. R. Co., 151 Pa. 67. In said case the petition was presented fourteen years after the construction and completion of the road and it was decided to be in time. As in this case under consideration, the Company in the case above cited, complied with the alternative of the mandate and gave bond. Its entry upon, and subsequent occupation of the land was therefore lawful, and as was said in 118 Pa. 512, the company acquired "as clear and perfect a title to the easement as if it had paid therefor in cash and the plaintiffs only remedy is upon the bond in counection with the statutory provision for the assessment and collection of damages."

The company has no ownership of the land taken, and by filing its bond acquires only a conditional title to a right of way, which ripens into an absolute one, upon making compensation; Johnson v. Callery, 173 Pa. 129. It follows that the continual occupation of the ground taken cannot be held to confer ownership in the land, or immunity from the payment of damages, or proceedings for their ascertainment under the Act of Assembly.

It is further contended by the company that the mortgaging of the road and the reorganization set forth in the answer should be held as a bar to these proceedings—that the collection of damages after this long acquiesence on the part of the land owner, would be an injustice to the bond holders and innocent parties which should require denial, by the Court, of the relief prayed for.

We do not think this position tenable, if no notice of the view, as required by law was given by the company.

But was not the notice legally given? It appears from the testimony taken on behalf of the Rail Road Company, that John McAlister, the petitioner in this proceeding. directed the president of the Company to give any notices he was to receive to his agent McDonald, saying that "he would soon go to his home in Western Pennsylvania and that any communication we had to make in relation to rail road matters we could make or leave with Mr. Morgan McDonald who attended to his business about his land, in his absence. or words to that effect." This was very late in 1872, and the notice was left with the family of McDonald, in pursuance of this direction of Mr. McAlister, as testified by S. G. Boyd, Esq., then the president of the road. Mr. Boyd further tes-

tifies that it seemed to him that he met Mr. McDonald that day he left the notice, as he went away from McDonald's house, and he that thinks, he. McDonald, said Mr McAlister would get the notice. This is not positively stated, but we think that after this great lapse of time, and in view of the fact that McAlister has frequently been in the neighborhood since, and took no steps to have the damages assessed or in any way to assert his legal rights, that it is amply sufficient to require the c.lling of McDonald, who still lives in the neighborhood as witness to disprove his agency and the testimony of Mr. Boyd as to having met him on the day of leaving the notice, and his saying McAlister would get the notice; if he could s) testify.

He was not called as a witness and did not testify, and the inference is strong in favor of the truth of Mr. Boyd's cautious statement of the recollection of the facts as they occurred away back in 1873.

We think the notice of the view to McDonald, who was designated to receive all communications from the Company for Mr. McAlister, is proven to have been received by McDonald, and that therefore, the proceedings attacked are regular and the relief prayed for by the petitioner must be refused.

The petition is dismissed at the cost of the petitioner.

Bose v. County of York.

Constable—Compensation for time—Fugitive.

Plaintiff was the agent of the Commonwealth to receive and return to the State a fugitive from justice, apprehended in another State. He claimed compensation from the County for his time spent in the discharge of his duty. HELD, on a case stated, that he was entitled to recover.

The Act of March 31, 1860, Purd. Dig. 545, provides that the expenses of "transporting any person," &c., shall be paid by the county where the offence is charged to have been committed. It seems reasonable that this contemplates compensation for services as well as actual outlays.

Case stated.

The question in dispute is given in the Court's opinion.

Geise & Strawbridge for plaintiff.

Ross & Brenneman for defendant.

October 18th, 1897. STEWART, J.—The plaintiff was the agent of the Commonwealth to receive and return to Pennsylvania and into this county for trial Daniel A. Smeltzer, a fugitive from justice, apprehended in the State of Illinois, and who had been arrested there on a requisition issued by the executive of this State. It is agreed by the case stated that this service was rendered by the plaintiff "and that the costs of the arrest and return of the prisoner to the Sheriff of York county under and by virtue of said requisition have been paid, but the defendant refused to pay any compensasation whatsoever to the said plaintiff for said service allowing him simply his outlay for all purposes in the premises * * * * * which he accepted under protest and reserved the right to recover $20.00," the amount of five days service at $4.00 per day for the time occupied in the discharge of his duties.

It is agreed that the plaintiff was actually and necessarily engaged five days in said service and he claims to be paid $4.00 per day and no question as to the amount is raised, but the Court is at liberty to enter judgment for that amount if it is found that the plaintiff is entitled to a per diem compensation. The only trouble I have with the case is the amount of the compensation. It is not fixed by any statute or fee bill, as was sufficiently shown by the case of Ginter v. The County of York. The plaintiff contends that payment is authorized by the First Sec. of the Act of 31 March, 1860; Br. Purd. Dig. (12th Ed.) 545.

This act provides that the expenses of "transporting any person charged with having committed any offence in this State from another State into this State for trial, or for conveying any person after conviction to the penitentiary, shall be paid out of the treasury of the county where the offence is charged to have been committed" For conveying convicts to the penitentiary the Sheriff's fee bill fixes his compensation at $4.00 for each person; so that the claim made by the plaintiff for a similar service does not seem unreasonable. That the act contemplates compensation for services as well as actual outlays seems reasonable. Such services are necessarily onerous and dangerous and require courage and endurance and

are often performed at great personal hazard.

What is meant by the "expenses of transporting" such fugitives? The legislature certainly could not have intended actual outlays of money merely. Suppose the fugitive to have been a desper ate character or two or more of them, and it was necessary for the executive agent to have assistance, whom he would employ and pay for their time. Could it be contended that such outlays would not fall within the legislative meaning of the expenses of transporting such fugitives, and if not, why should the agents own time and service not fall within the same construction?

The plain legislative intent is that the county shall be liable for such expenses; this can not be well denied and is only denied because no act has fixed the amount.

In a suit against the County upon a *quantum meruit* a jury could determine this and under the case stated, I am at liberty to do so. I am therefore of opinion that the plaintiff is entitled to recover and I fix the amount at $4 00 per day the same as allowed the Sheriff for similar services. This view of the question is sustained in a recent well considered opinion in the case of Frazer v. Allegheny Co., 19 C. C. R. 458.

Judgment is entered in favor of the plaintiff and against the defendant for the sum of $20.00 with costs of suit.

C. P. No. 2 of Allegheny Co.

Elliott v. City of Pittsburgh et al.

City contracts—Restriction—Trade union.

The city of Pittsburg passed an ordinance which in effect was that in all building contracts to be awarded by the city before such bids should become valid, the bidder must stipulate that he would not employ any person except those belonging to the organizations approved by the Building Trades Council of Pittsburgh, and failure of the bidder so to do would forfeit his contract, which would be completed by the director of public works. The plaintiff was awarded a contract for public buildings in pursuance to advertisements for bids, which did not mention the above ordinance, but which was subsequently given to another in pursuance of advertisements which recited the ordinance, and to which the successful bidder assented. HELD 1. Upon bill filed by the plaintiff, the first bidder, to have the contract awarded to him, that he was not entitled to it because it had not been approved by the councils, which was necessary, and

2. That under the Act of May 23, 1874, requiring contracts for public works to be given to the lowest responsible bidder, the ordinance was illegal, as it prevented free and open competition.

Bill in equity for injunction.

J. M. Shields for complainant.

Clarence Burleigh, city solicitor, and *A. C. Robertston* for defendant.

June 26th, 1897. WHITE, P. J.—1. The councils of the city of Pittsburgh passed an ordinance entitled "An ordinance relating to bids for building contracts hereafter to be awarded by the city of Pittsburgh," in which it was provided that "before such bids shall be deemed valid and be entitled according to law to award thereon of contracts by the city of Pittsburgh, they shall contain, signed by the bidder, the following clauses," among which were the following: "That the bidder, as contractor, will not employ or authorize or suffer to be employed by any person, by, through or under him, in any manner whatever, any person except persons belonging to the organizations approved by the Building Trades Council of Pittsburgh, of the crafts or trades appertaining to the work to be done by persons employed respectively under the terms and provisions of the contract so awarded." And also this: "That failure by the bidder to comply with the above condition shall authorize the director of the department of the city government having charge of said contract to forfeit the same and to complete the work contemplated in such contract at the costs of the bidder, and to hold the bidder and his sureties responsible to their respective original liability, as well as for any extra costs that may be incurred by reason of forfeiture and completion of said contract by such director."

2. On February 24, 1897, Edward M. Bigelow, as director of the department of public works, advertised for proposals for doing certain work for the city, among which was for the painting of engine-room and boiler room at Herron Hill Pumping Station, painting fences around reservoirs at Highland Park, painting fences around reservoir at Herron Hill, painting engine and boiler rooms at Lincoln Pumping Station.

3. That the plaintiff put in bids for said painting for the sum of $1,358.00, which was the lowest bid received for said work, and reported by said Bigelow to

the committee on public works as the the lowest bidder and entitled to the award. But before the committee took action on the same, at the request of said Bigelow, the resolution approving the award was returned to said Bigelow for the purpose of re-advertising for bids. The first advertisement did not require that bids should be made under and subject to the above recited ordinance, and the plaintiff's bid was made in pursuance thereof.

4. The director of the department of public works then advertised again, making the bids subject to the provisions of the above recited ordinance. The plaintiff did not bid; others did. Under the restraining order of court, the bids have not been opened, awaiting the declaration of the court in this case.

CONCLUSIONS OF LAW.

The prayers in the bill are (1) that the said ordinance may be declared illegal; (2) that the director be restrained from further advertising for bids for said work; (3) that injunction issue; (4) that the contract be awarded to plaintiff.

The director awarded the contract to plaintiff under the first bidding; but that had to be approved by the committee on public works and by councils before there could be a valid contract. There was therefore no valid contract with the plaintiff and no award on the first bidding. Under these facts, the plaintiff is not entitled to have the contract awarded to him.

The main question is, is the ordinance legal—had the councils the power to pass it?

The Act of Assembly of May 23, 1874, P. L. 133, requires that all contracts for work to be done for the city shall be performed under contract "to be given to the lowest responsible bidder." This requires a free open competition by all persons who may wish to bid. Limiting the contractor to employ only a certain class of workmen, without regard to qualification, prevents free and open competition, and may result in a higher price for the work than would be bid by equally competent and responsible contractors, who would not bind themselves to employ only the class of workmen designated in the ordinance. The city has a right to protect itself from improper materials or unskillful work, and that can be done whoever the contractor may be. No doubt there are just as competent contractors and just as skillful workmen who do not belong to the associations referred to in the ordinance as those who do.

The city has no right to say that the "Building Trades Council of Pittsburgh," and they only, shall designate the workmen who may be employed on any city work. That is what this ordinance does.

Another provision of this ordinance is unreasonal and oppressive, well calculated to deter bidders and be injurious to the city. The contract is at the mercy of the director of public works. If one or two men not of the associations sanctioned by the Building Trades Council should be engaged on the work employed by him or by some foreman, the director may declare the contract forfeited, and then go on and complete the contract in his own way, and hold the contractors and his sureties to all costs and additional expense.

We consider the ordinance illegal, beyond the power of the councils, in the particulars above indicated. Bids should be free and open to all competitors, and contracts awarded to the lowest responsible bidders without the limitations and restrictions imposed by said ordinance. Let decree be drawn accordingly.

C. P. of Northampton Co.

Bohan v. Reap et al.

Practice—Attachment—Act May 19, 1887.

An attachment execution may be issued upon a judgment that is more than five years old unrevived, even though no *scire facias* to revive has issued simultaneously with the attachment.

The Act of May 19, 1887, allowing executions to be issued on expired judgment, if a *scire facias* to revive is sued out at the same time, does not apply to attachment executions.

Rule by defendant to quash attachment.

C. F. Bohan for plaintiff.

D. L. O'Neill for defendants.

April 5th, 1897. LYNCH, J.—Judgment in assumpsit was entered July 17, 1877, for nine hundred and seventy-three dollars and fourteen cents. The next step in the case was taken October 12th, 1896, when the plaintiff caused execution attachment, with clause of *scire facias* to the Continental Fire Insurance Company, garnishee, to be issued and served on the garnishee October 14, (who answered January 7, 1898, that there was due de-

fendant five hundred and fifty dollars upon a policy of insurance, and that he had claimed the benefit of the law exempting property from levy and sale on execution,) and on the defendant November 29, 1896. This rule was granted on December 17, which was, therefore, in time; Kohler v. Thorne, 154 Pa. 189.

The reason assigned for quashing the writ is that a *scire facias* to revive the judgment was not issued at the same time the attachment was, as provided by Act of May 19, 1887. P. L. 132.

At common law, execution must have been sued out within a year and a day after the judgment was entered, otherwise the court presumes *prima facie* that the judgment was satisfied. But after a delay of a year and a day the plaintiff could have a *scire facias* under the Stat. of West. 11, c. 45, to compel the defendant to show cause why the judgment should not be revived, and execution had against him, to which the defendant might plead such matter as he had to allege in that behalf; or the plaintiff might bring an action of debt on the judgment, which was only the common law method of revival; and on obtaining judgment in either of these proceedings, the plaintiff might issue execution thereon, in the same manner as on the original judgment. The rule as to a year and a day was the law in this State down to the Act of June 15, 1836. By the Act of April 16, 1845, the period within which execution can be issued, without a previous revival of the judgment, is extended t ofive years.

Ogilsby v. Lee, 7 W. & S. 445. (1844,) decided that a writ of attachment in the nature of an execution may issue after the expiration of a year and a day. Sargeant, J., said: "To this summons it is clear that the defendant may appear and become a party, and plead payment, or any other plea which he might take advantage of, upon a *scire facias post annum et diem*. To require a previous *sci. fa.* to issue after a lapse of a year and a day before a writ of attachment could be taken out, would therefore seem to be superfluous, not tending to secure any purpose of justice, but leading to unnecessary expense and delay."

This was followed and approved in Gemmill v. Butler, 4 Pa. 232, (1845,) where it is said: "But the panacea which restored that case will cure this also; in the attachment process the defendant has a day in court, in which he can have full power to make any defence that he could make in a *scire facias*.

Swanger v. Snyder, 50 Pa. 223, (1863,) Strong, J., in speaking of the difference between attachment executions and executions, said: "The Act of Assembly does not in words apply to attachments, and they do not seem to be within its spirit when the defendant has an opportunity to be heard in opposition to the claim of the attaching creditor." Thus it appears that prior to the Act of 1887, attachment proceedings were not regarded by the court as executions within the meaning of the Acts of 1836 and 1845.

The Act of 1887 does not in words repeal any prior Act, but allows execution sued out, although the judgment may have lost its lien upon real estate, without a previous writ of *scire facias* to revive, provided it shall not issue after the lapse of twenty years from the maturity of the judgment, and at the same time execution is issued "a *scire facias* shall be issued to revive the judgment," * * The language is not a whit stronger in this Act than is that of the previous Act above referred to.

Again, the title of the Act of 1887 seems to indicate that the Legislature did not intend the Act should apply to attachments. It is, "an Act authorizing the issuing of executions upon judgments, for the purpose of selling property of the debtor, after five years from the entry of such judgment, without a previous writ of *scire facias* to revive the same."

An attachment execution is not issued for the purpose of *selling* personal property. Under it the sheriff has no power to sell. He simply warns, and attaches the property of the defendant. Ogilsby v. Lee does not appear to have been criticised, qualified, limited, or overruled by the Supreme Court, and therefore must be accepted as the law on the question there ruled; and it was there said that in attachments the defendant may plead *payment* or any other plea. Why then does not the defendant in this proceeding stand as well as if a *sci. fa.* to revive issued with the attachment? There is nothing in the Act of 1887 which deprives him of this right; why, then, is it essential to first issue a *scire facias* to revive the judgment when the legal rights of all

parties in the action can be adjusted without such writ, expense and delay?

The Act of 1836 provides that after the expiration of five years no execution shall be issued unless the defendant shall first be warned by *scire facias*, and that of 1887 provides that at the *same time* execution is issued to revive. Since attachment without previous warning has been sustained under the earlier Act, there appears to be no valid reason why this writ may not be good.

This court has the highest respect for the decision of Judge Arnold, who, in Sweeting v. Wanamaker, 4 D. R. 246, held, that since the Act of 1887, "an attachment execution more than five years old must be accompanied with a *scire facias* to revive the judgment," but in construing these Acts we are forced to follow what appears to us to be a sound but different intrepretation

The rule to quash the writ is discharged.

QUARTER SESSIONS.

Alley in Winterstown Borough.

Streets—Opening of—Notice.

The report stated that notice was given by "due notice according to law, a copy of which is hereto attached, and said notice has been published in the Stewartstown News, and by hand bills on each end of the proposed alley and at every public place in the Borough." HELD, on exceptions, that the allegation that due notice was given is sufficient, in the absence of proof to the contrary.

A satisfactory method of practice is to accompany the report with the oath taken by the viewers and the order to view.

Exceptions to Report of Viewers.

John W. Heller for exceptions.

James G. Glessner for report.

October 18th, 1897. STEWART, J.—Three exceptions are filed to this report.

1. That Joseph E. Patterson, one of the viewers, was not a freeholder.

2. That notice as required by Sec. 1, Act of May 16, 1891, was not given.

3. That the proceedings were illegal.

There is no evidence in support of the first exception. The only exceptant who did not appear as shown by the report of viewers, is D. S. Mitzel, a resident of Winterstown Borough, a small place of two or three hundred inhabitants and to whom the viewers should be and no doubt were well known, as well as whether or not they were freeholders. By the exercise of due diligence he could have known this fact which is sufficient to charge him with notice; Street in New Salem, 5 YORK LEGAL RECORD 175; Pennsburg Alley, 12 C. C. 215.

The proceedings were instituted under the Act of May 16 1891, P. L. 75, the first section of which requires the viewers to give ten days notice of the time of their first meeting by publication in one or more newspapers of said corporation or of the county in which it is situate. The report states that notice was given as follows: "Due notice according to law, a copy of which is hereto attached, and said notice has been published in the Stewartstown News, and by hand bills on each end of the proposed alley and at every public place in the Borough of Winterstown." A copy of the notice as published, together with an affidavit of its publication, does not accompany the report as it should do, but a written copy thereof is attached to the report. I am of opinion that the allegation contained in the report that due notice according to law was given is sufficient in the absence of proof to the contrary; Fourth Street, 158 Pa. 469.

The report is not accompanied by the order to view, nor with the oath taken by the viewers which would be more a satisfactory method of practice, although perhaps not essential.

For the reasons stated, the exceptions are all dismissed and the report confirmed.

Q. S. of Lawrence Co.

Com. v. Phillipi et al.

What is necessary to constitute a gambling-house—What is a common gambler—Act relating to gambling and its construction.

Solicitation to gamble is not a crime, unless it results in persuading one to visit a place kept for the use of gambling.

If defendant permitted boys to congregate at his place of business and gamble for money, he was guilty of keeping a gambling house, although there was no rake-off to the room.

If a man plays only a very few games of poker, he can not be convicted as a common gambler.

Charge to the jury.

Ben Phillipi, Herman Helling, Dan Smith, D. D. Cunningham, Nathan Hazen, Charles Graham and Norman Cunningham were indicted at No. 8 March Sessions, 1897; the indictment containing five counts, viz: 1. Establishing a gambling house. 2. Keeping a gambling house, 3. Being a common gambler. 4 Being a common gambler. 5. Enticing others to visit gambling-houses. Scott Cunningham was indicted separately in the same counts at No. 11 March Session, 1897, and was tried with the other defendants

Robert K. Aiken Dist. Att., and *H. N. Marshall* for the Commonwealth.

Aaron L Hazen, John G. McConahy, J. Norman Martin and *Frank A. Blackstone* for defendants.

March 9 1897 MILLER P. J.

Gentlemen of the Jury:—The defendant has requested us to answer the following points:

1. That if the jury should believe from the evidence that the defendants mutually agreed together to go to a room such as has been described in the evidence and play a game of poker, and did actually go and play poker for money, that of itself would be no crime. *Answer:* Affirmed. But if you find from all the evidence that the defendants or any of them engaged in gambling for a livelihood, you would be justified in finding such defendant or defendants guilty on the fourth count.

2. That gambling of itself is no crime; nor is the solicitation of others to gamble a crime. *Answer:* This point as stated is refused. Gambling under the law, is an indictable offense. The solicitation to gamble is not a crime, unless the solicitation results in persuading or prevailing upon one to visit a place kept for the use of gambling.

The defendants are indicted in this case on five counts and two indictments. Both indictments have, however, precisely the same counts in them, so that practically you are trying these defendants as though they were indicted under one indictment. They are charged in the first count of each indictment with establishing a gambling-house. In the second count of each indictment they are charged with keeping a gambling house.

It may not be amiss to explain what a gambling-house is as regarded the law, and what gambling is as regarded under the law. In general, the words "gaming" and "gambling," in the statutes, are simular in meaning, and either one comprehends the idea that by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is as the conclusion, by terms agreed, to be transferred from the loser to the winner; without which latter element there is no gaming or gambling. "Gaming" implies or is used as describing a condition, an element, of illegality, and when people are said to be gaming, it is generally supposed that the games have been games in which money goes to the victor or his backer. In criminal law, gambling-houses are defined to be houses in which gambling is carried on as the business of the occupants, and which are frequented by persons for that purpose.

The clause in the Act of Assembly under which the first count of the indictment is drawn is as follows: "If any person shall set up or establish, or cause to be set up or established, in any house, room, outhouse, tent, booth, arbor or other place whatsoever, any game or device of address or hazard with cards, etc." Your first inquiry will be, are the defendants or any of them guilty of establishing a gambling-house; and second, whether they are guilty of keeping a gambling-house. That (second) count is drawn under another section of the same Act of Assembly, which reads as follows: "Or if any person shall procure, permit, suffer and allow persons to collect and assemble in his house, room, outhouse, tent, booth, arbor or any other place whatsoever under his control, for the purpose of playing at and staking or betting upon such game or device of address or hazard money or other valuable thing."

If you find from the evidence that Mr. Phillipi permitted gambling in his place of business, in his pool-room, or in a room connected with it, or in any part of the building under his control, you would be justified in finding him guilty on the second count of the indictment. If you find that he had set up a place in his pool-room, or in some room connected with his pool-room, or in the building that he controlled, for the purpose of allowing

persons to congregate to play poker or other games of cards for money, you would be justified in finding him guilty on the first count in the indictment.

The only purpose for which the court admitted the evidence with regard to the sale of the table by Phillipi was, in connection with the testimony of the constable, and in connection with the conversation that Phillipi had with him, as to whether or not he had that table in his place of business for the purpose of allowing persons to use it as a gaming-table.

Then as to Scott Cunningham. Did he set up a place for gambling as charged in the first count of the indictment, or did he keep a place for gambling as charged in the secound count? The evidence bearing on that is largely the testimony of the officer, Mr. Duncan. If you conclude from the testimony that Scott Cunningham had set up or established a place where poker or other games of cards were played for winning money, you would be justified in finding him guilty on the first count. If you find from the evidence that he permitted boys to congregate at his place of business for the purpose of gaming, yon would be justified in finding him guilty on the second count. If they met there and gambled for money, and he permitted them to do so, although there was no rake off to the room, it would be gambling.

Then we come to the third and fourth counts in the indictment, which charges the defendants with being common gamblers. They are indicted under the 56th section of the Act of 1860. The first clause, under which the third count is framed, reads as follows: "If any person shall keep or exhibit any gaming table, establishment, device or apparatus to win or gain money or other property of value, or aid to assist or permit others to do the same, * * * he shall be deemed and taken to be a common gambler." You will inquire whether any of these defendants kept or exhibited any gaming-table, establishment, device or apparatus to win or gain money or other property of value, or aided, assisted or permitted others to do the same.

Mr. Wood and Mr. Smith testify that at several times, when they were at the Voight House, Scott Cunningham acted as banker; that is, he sold the chips that have been exhibited to you to the persons who played; that he took a rake-off from the table at certain times, and that, when the playing was over, he redeemed the chips from the persons who had won them. If you find the facts as sworn to by Mr. Smith and Mr. Wood, you would be justified in finding that Scott Cunningham aided and assisted, or permitted others to win or gain money or other property of value at this gaming-table and you would therefore be justified in finding him guilty on the third count of the indictment.

Then we come to the fourth count of the indictment, and it is framed under this clause of the Act of Assembly: "Or if any person shall engage in gambling for a livelihood." The Commonwealth avers that all of these defendants are engaged in gambling for a livelihood.

It is proper for the court to say, that if a man only plays one or two, or a very few games of poker, the jury would not be justified in saying that he was engaging in the business for a livelihood. For instance there was a Mr. Nye on the stand, a witness who testified to seeing these defendants, or some of them, at different times engaged in gambling. I think he testified that he played but a single game at this house. Now, if he were indicted, it is not likely that you would find him guilty of being a common gambler because he participated in a single came. That is not the object of the law. The object of the law is to punish men who follow gambling as a business; not as a sole business, but as one of the businesses they engage in to make money and earn a livelihood. It was the purpose of the passage of the act to stop gambling. The law regarded it as a vice; as being injurious to the morals of society; as being injurious to men, especially young men, leading them from the paths of virtue, enticing them from rectitude, causing them to engage in practices that would most certainly lead to their ruin; and hence the law was passed for the express purpose of punishing men engaged in gambling for a livelihood or as one means of earning money.

In considering the question whether these defendants, or any one or more of them, are common gamblers, you would consider what they did; and you would go back and consider the testimony of

Mr. Duncan in regard to Phillipi, as to what he was doing, or allowing to be done. or permitting to be done, at his pool-room last summer: what this table in evidence was being used for at his place; what he had it there for. You will inquire what he was going to the Voight House for from the time that Robertson established it up until the time of the raid. Was it simply for amusement, and not for the purpose of gaining or earning money, or trying to gatn money. If he was going there simply for amusement and not for the purpose of gaining money, he should not be convicted as a common gambler.

What was Doctor Cunningham going to this place for? Was it simply for the purpose of amusement, or was it for the purpose of playing the game that was be ing run there and to gain money off some other person? Was he following it as a business—as part of the business of his life?

What was Norman Cunningham doing there? You will remember the testimony of the witness Mulcahy in this connection, as far as Norman Cunningham is concerned. It seemed that Norman Cunningham worked on the railroad, and that sometime last summer he was laid off. Mulcahy met him and had a conversation with him, and asked him what he was working at, or where he was working, and Norman Cunningham told him he was not working any place, that he could make more money in the "game" than he could working for the Pittsburgh and Western Railway. What did he mean by that? Did he mean that he had quit working; quit performing manual labor for a livelihood, and had taken to playing some game? Was he frequenting this room at the Voight House night after night for two months? If he was, what did he go there for? Was it to win money from some one else? Was he there for the purpose of trying to earn a livelihood? If he was, he should be found guilty of being a common gambler.

What was Doctor Cunningham doing there? Was he there for the purpose of earning or trying to earn a livelihood in connection with his other business? If you find that was what he was going there for, night after night, you would be justified in finding him guilty as charged in the fourth count of the indictment.

You will make the same inquiry as to the other defendants, and if you find from the evidence that they were frequent visitors at the room in question for the purpose of playing cards for money, you should convict them.

By ex-Judge Martin:—In Justice to Mr. Phillipi, I wish to call the court's attention to a proposition of law that we think is pretty well settled, and that is, that a single act of gaming in a house is not enough to convict a person of setting up a gaming-house.

By the Court:—Gentlemen of the Jury: If you should conclude there was never any person playing cards for money in his pool-room, except this one time, that of itself would not be setting up a place. You will take the testimony of the constable as to what he saw and the conversation he had with Phillipi, and from it all decide whether or not he did set up a place in his pool room.

Verdict: Ben Phillipi and Scott Cunningham guilty in the first, second, third and fourth counts; the other defendants guilty in the third and fourth counts.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Insurance—Attaching creditors.—Where an insured brings suit on a fire insurance policy, and the verdict is for the defendant and judgment is entered thereon, in the absence of fraud or collusion such judgment is conclusive against a creditor of the insured, who had issued an attachment execution against the insurance company as garnishee, prior to the issuing of the summons by the insured.—*Mengel v. Connecticut Fire Insurance Company*, Superior Court, 28 Pittsburgh Legal Journal 93.

Judgment—Opening of—When evidence insufficient.—Where on a rule to open a judgment the evidence in corroboration of the defendant's testimony is so slight as hardly to add any weight to it, and the defendant is contradicted by the plaintiff, the rule will be discharged.—*Fulton, assignee of Bair, v. Krause*, (Lancaster C. P.) 14 Lancaster Law Review 259.

York Legal Record.

Vol. XI. DECEMBER, 1897. No. 6.

ORPHANS' COURT.

Byers' Estate.

Will—Construction of—Life Estate.

Testator by his will, after making several bequests to equalize his children, ordered his real estate to be converted into money, and disposed of the balance as follows: "And what is left over and above the above legacies shall be equally divided among my four children, or should they die before such division be made then it shall go to their issue as their parents share of my estate subject, however, to the following request. I direct that my daughter Ida C., married to William H. Bushey, shall invest her share of my estate as a first judgment or mortgage, and to receive the annual interest of the same during her natural life, and at her death it shall return to such of her children as shall then be living, and to the issue of then living of such of them as may then be dead, such issue taking, and, if more than one, among themselves dividing the share or shares which their parent or parents respectively would have taken if then living. I direct that my daughter Ollie B. wife of Joseph Comfort, Carrie and Elmira, shall receive the annual interest of their individual share of the residue of my estate as it shall be invested for them by my hereinafter named executors; said investment not to be at the risk of my executors, but I direct them to make it as safe an investment as possible; and at the death of my children above named I direct that it shall be for their issue and should either of them die without children then the share of such one shall return and be part of my estate and be divided among my living heirs." HELD, to give all the daughters only a life estate.

Although the bequests to Ollie B., Carrie and Elmira were absolute in the first instance, they are afterwards reduced to life estates by the direction to invest, payment of the income annually for life and a disposition of the principal.

The auditor found that the words "subject to the following request" were merely precatory, and did not affect her bequest so as to limit it for life. HELD, to have been error.

The direction to invest, especially in view of the fact that the whole will shows the intention of the testator to equalize his children, unmistakably expresses the intention to create a trust.

Exceptions to Auditor's report.

The report of the Auditor, George W. Heiges, Esq., on the question in dispute, is in substance as follows:

In view of the contention [as to the nature of a particular bequest] and the close question raised by the language of the several bequests, the will is here given in its entirety.

In the name of God, Amen: I, Joseph B. Byers, being paralyzed in body by accident, being of sound mind, memory, and understanding, and feeling that my time on earth is short, do make and publish this my last will and testament, hereby revoking and annulling any former will by me at any time made.

I direct that my body receive decent burial and that the proving of this will as well as all my just debts be fully paid for.

I give and bequeath unto my beloved wife, Mary J. all my wearing apparel to be disposed of as she may see fit. I also bequeath to her such articles of my household goods and furniture and such consumable supplies as may be on hand at the time of my death, as she may choose to retain for her own use; and also such articles of my farming implements as she may see that she may need to farm her land; I also give and bequeath to her my gray horse called George, the harness (for the buggy) and the carriage and the cart; also the Organ with the understanding, that after she is done with it, that it shall belong to and become the property of Minnie B. Kuttz.

I further direct that my wife shall have the use of the wood lot, on what is known as my lower farm, lying between the public road and Kesiah Bower's lot, for to pasture her cows, so long as the farm is not sold. Also that she shall have the privilege to get her fire wood from both or either of my farms so long as they are not sold.

I bequeath to my daughters, Carrie and Elmira, the sum of ($200) Two hundred dollars each. Said sums to be instead of an outset given to each of my daughters Ida C., wife of William H. Bushey and Ollie B. wife of Joseph Comfort.

I bequeath to Minnie B. Kuttz the sum of one hundred ($100.00) dollars.

I bequeath to L. C. LaMotte Spahr, the sum of one hundred ($100.00) dollors, to be kept in trust for him by my wife until he arrives at the age of Twenty-one years, but should he die before he attains to that age then I direct that as soon as possible after his death that the said sum with accrued interest be equally divided among my four children or if they

be dead then to such of their children or other heirs as may be living.

I bequeath to William H. Bushey, husband of my daughter Ida C., a certain sale note of one hundred and fifty-eight ($158 82) dollars and eighty-two cents, on which Thirty dollars have been paid.

I bequeath to each of my daughters, Ollie B., wife of Joseph Comfort, Carrie and Elmira, the sum of one hundred and Twenty ($120.00) dollars in lieu of the above note to William H. Bushey.

I direct that sale be made of such personal property, not already herein bequeathed, by my hereinafter named Executors; also that they sell my real estate as soon as convenient and convey the same to the purchaser or purchasers and in every way to give as good a title as though I did it; and the proceeds of said sale to be considered as a part of my personal estate and to be applied to the payment of the above named legacies herein bequeathed. And what is left over and above the above legacies shall be equally divided among my four children or should they die before such division be made then it shall go to their issue as their parents share in my estate, subject however to the following request, I direct that my daughter Ida C., married to William H. Bushey, shall invest her share of my estate as a first Judgment or Mortgage and to receive the annual interest of the same during her natural life, and, at her death it shall return to such of her children as shall then be living and to the issue then living of such of them as may then be dead, such issue taking, and, if more than one, among themselves dividing, the share or shares which their parent or parents respectively, would have taken if then living.

I direct that my daughters Ollie B., wife of Joseph Comfort, Carrie and Elmira, shall receive the annual interest of their individual share of the residue of my estate as it shall be invested for them by my hereinafter named executors; said investment not to be at the risk of my executors, but I direct them to make it as safe an investment for my children as possible; and at the death of my children above named I direct that it shall be for their issue. Should either of them die without children then the share of such one shall return and be part of my estate and be divided among my living heirs.

I direct that my wife's dower be left stand, at five (5) per cent. equal shares in my farms, one half in the Homestead farm and the other half in the lower farm. And after the death of my wife Mary J.' I direct that the above dower be collected and divided between my four children Ida C., Ollie B., Carrie and Elmira or if they should not be living or not have left any issue then it shall be divided among my living children or to their issue as their part of their parents share would be of said dower, if living.

I nominate and appoint my wife Mary J. Byers, and my friend David F. Smith executors of this my will, with full power to act in my stead.

A construction of the said will must first be made before a distribution can be reported.

From inspection of the records before your auditor, it appears that the testator executed his said last will. September 14th, A. D. 1895, died seized of two farms, a wood lot, and small tract of land, all situate in York county, Pa., September 18th, A. D. 1895, leaving to survive him Mary J. Byers, widow, and children named in his Will, all of mature age, and Letters Testamentary were issued upon his said will to the Executors therein named, September 28th, A. D. 1895.

The fund for distribution, the balance on the account $5,893.45 is the proceeds of the testator's real estate, sold by his direction, and therefore by the act of conversion, personal estate.

In addition, the testator provides in this particular, as follows: "And the proceeds of said sale," i. e. the sale of his real estate, "to be considered as a part of my personal estate and to be applied to the payment of the above named legacies herein bequeathed."

What is the interest of Ida C. Bushey in the bequest to her? Is it an absolute one? or is she to receive the income, only, from what shall hereinafter be ascertained to be her legacy, during her life? It will be observed that the bequests of $200 each to his daughters Carrie and Elmira and $100 to Minnie B. Kuttz, and $100 to L. C. LaMotte Spahr, and further bequests of $120 each to his daughters Ollie B., Carrie and Elmira to equalize them with Ida C. Bushey as the testator sup-

posed and clearly had in his mind in bequeathing to William H. Bushey the balance of $120.00 appraised value of a note held against him, the note itself, in fact, in all, the sum of $960, is less than ⅓th of the fund, and yet the testator provides as follows: "And what is left over and above the above legacies shall be equally divided among my four children," &c.

The share of Ida C Bushey is therefore an equal one-fourth of what is "left over." Now the language of the Will, following the above division, is somewhat peculiar, the testator providing further, "or should they die before such division be made then it shall go to their issue as their parents share of my estate, subject however, to the following request, I direct that my daughter Ida C., married to William H. Bushey, shall invest her share of my estate as a first Judgment or a Mortgage and to receive the annual interest of the same during her natural life," &c., &c.

In the Auditor's view "request" is confined to the legacy to Ida C. Bushey. The auditor is strengthened in this view by the fact that the provision for his other three daughters is the same in each and every case, and is different from his direction in the case of Ida C. Bushey. Why different? In the cases of the latter three daughters, the testator clearly conveys the idea that they shall each receive only the "annual interest" of their respective legacies, in directing that their shares shall be invested for them by the Executors, who are constituted by the testator quasi trustees for them only, in that they are to be at no risk in making the investments of their legacies, and, in a certain contingency, their legacies, in the language of the testator, "shall return and be part of my estate, and be divided among my living heirs" If the testator intended Ida C. Bushey to receive only the "annual interest" of her share, why did not the testator join her with her sisters in the provision made for them? Ida C. Bushey, herself, is to do her own investing.

Under the authorities relied upon by Mr. Miller, above noted, in the auditor's view, the "request" in her case, whether the request may be taken to be restricted to her or not, is a mere recommendation and the direction is merely precatory; and the absolute estate given to his entire four daughters in the preceeding clause is not "cut down" by the request and the subsequent direction as to Ida C. Bushey's legacy in the "residue."

Much stress was laid upon the use of the word "direct" following "request" by the learned counsel to the accountants; but, in view of the ruling in Boyle v. Boyle, 152 Pa 115, "direct," though it have the force of a command, can not reduce the absolute interest bequeathed to Mrs. Bushey in the preceding part of the same sentence if the punctuation mark after request is a comma; but whether a comma or a period does not affect the intention. In Boyle v. Boyle, supra, Williams, Justice, it is ruled as follows: "We held, in an opinion by our brother Mitchell,"—see Good v. Fitchthorn, 144 Pa. 287,—"which fully sustained the judgment, that words of command addressed by the devisor to the devisee are as ineffectual to reduce a fee to an estate for life," &c. * * * * "This does not disturb the rule that words importing a fee may be limited in their operation and the estate reduced, where, upon the whole will, it is clear that the testator intended only a life estate, as was the case in Urich's Appeal, 81 Pa. 336; but what we say now is that mere precatory words, or words of command or words of explanation are not enough to establish an intention that is not to be gathered from a consideration of the operative words upon the face of the instrument."

The first takers are always supposed to be the principal beneficiaries of a testator's bounty, and therefore the above ruling applies with added force to pecuniary legacies such as the legacy of Mrs. Bushey is. The auditor has read all the authorities cited by both the learned counsel, Messrs. Miller and Brenneman, and can affirm the legal propositions in the briet of the latter gentlemen, without coming to the conclusion as to the testator's intentions the learned gentleman has. The auditor is clearly of the opinion, for the above reasons, and many others not necessary to assign, that the interest of Ida C. Bushey in her ascertained share of her deceased father's estate is an absolute one, and it is so hereinafter awarded her.

The executors, having declined to assume the responsibility of investing the

legacies in the "residue" of Mrs. Ollie B. Comfort, Miss Carrie and Miss Elmira B yers imposed upon them in the Will, their respective legacies, in the "residue" are hereinafter awarded to a Trustee or Trustees to be hereafter appointed by the Orphans' Court of said county of said legacies.

To this report the following exceptions were filed:

1st. The learned auditor erred in awarding to Ida C. Bushey $1,135.99 absolutely.

2nd. The learned auditor erred in not awarding the share of Ida C. Bushey, out of said estate, in trust as provided by the will of the testator.

Ross & Brenneman for exceptions.

W. A. Miller, contra.

October 11th, 1897. BITTENGER, P. J.—The testator after making several bequests to equalize his children, orders his real estate to be converted into money, and disposes of the balance remaining, as follows:

"And what is left over and above the above legacies shall be equally divided among my four children, or should they die before such division be made then it shall go to their issue as their parents' share of my estate subject, however, to the following request. I direct that my daughter Ida C., married to William H. Bushey, shall invest her share of my estate as a first judgment or mortgage, and to receive the annual interest of the same during her natural life, and at her death it shall return to such of her children as shall then be living, and to the issue then living of such of them as may then be dead, such issue taking, and, if more than one, among themselves dividing the share or shares which their parent or parents respectively would have taken if then living."

"I direct that my daughter Ollie B. wife of Joseph Comfort, Carrie and Elmira, shall receive the annual interest of their individual share of the residue of my estate as it shall be invested for them by my hereinafter named executors; said investment not to be at the risk of my executors, but I direct them to make it as safe an investment for my children as possible; and at the death of my children above named I direct that it shall be for their issue and should either of them die without children then the share of such one shall return and be part of my estate and be divided among my living heirs."

It appears from the statement of counsel for the executors that the said Ida C. Bushey mentioned in the first quoted bequest is the mother of several minor children who are entitled in remainder in the legacy bequeathed and who have no guardian, and hence to the end that the legacy may be properly awarded, for the safety of the executor and the rights of said minor children, the exceptions were filed.

It is decided by the auditor that, notwithstanding the fact that the legacy is bequeathed subject to directions for investment in mortgage or judgment upon which investment the legatee is to receive the annual interest during life, and the principal at her death to go to her children or the survivors of them and the issue of such as may be deceased, that the said Ida C. Bushey has an absolute estate, and the legacy is awarded to her absolutely. The exceptions are to this award.

The auditor finds that the sisters of Ida C. Bushey, Mrs. Ollie B. Comfort and the Misses Carrie and Elmira Byers take only a life estate and sustains the trust created by the will as to their shares, although the bequests to them are absolute in the first instance and are afterwards reduced to life estates by the direction of the testator that their shares shall be held by trustees and the income paid to them annually for life, and that at their death the principal to go to their children in remainder, or in default of children then among testator's living heirs.

This ruling is based upon a fair and proper construction of the language of the whole will. "Every will is to be construed from its four corners, to arrive at the true intention of the testator. Decisions upon other wills may assist, but cannot control the construction. The order in which devises are made in wills is rarely of much importance;" Fox's Appeal, 99 Pa. 382. The question to be settled in giving construction to a will is not so much, what did the testator mean, as to the meaning of the words he has employed; Hancock's Appeal, 112 Pa. 532. But the words must be read according to their plain and ordinary meaning, taking the immediate context into view; Howe's Appeal, 126 Pa. 233.

In regard to the bequest to Ida C. Bushey the auditor decides that the language of the testator "subject to the following request," and though immediately followed by the positive direction to invest, and for the disposition of the interest during the life of the legatee and the principal at her death, is only precatory, and therefore does not affect her bequest, so as to limit it during the life of said Ida C. Bushey.

We are aware that in Pennsylvania mere precatory words will not convert a legatee or devisee of an absolute gift into a trustee, unless it affirmatively appear that they were intended to be imperative. But words expressive of a desire, &c., as to the direct disposition of the estate will constitute a bequest or devise.

All expressions in a will indicative of a testator's wish or will are commands; Burt v. Herron, 66 Pa. 400. It is different when a testator, having made a disposition, expresses a desire that the devisee should make a certain *use* of his bounty; Hopkins v. Glunt, 111 Pa 287.

A will must be so construed as to give effect to every part of it and harmony to the whole instrument; M'Devitt's Appeal, 113 Pa. 103.

Although a fee be given in the first part of a will, it may be restrained by subsequent words so as to convert it into a life estate; Ulrich's Appeal, 86 Pa. 386.

In a will "request" may impose a duty; Hatton v. Hatton, 41 N. J. E. 267; Colton v. Colton, 127 U. S. 300.

In the light of these well established principles, governing the construction of wills, can the auditor be sustained? Do not the words "subject to the following request" coupled with the direction to invest immediately following, unmistakably express the intention of the testator to create a trust for the benefit of Ida C. Bushey's children, as he did for the children of his other legatees? Especially in view of the fact that the whole will shows the testator's intention to equalize his children.

We think the only difference in the devise of the shares of the testator's children is in the case of Ida C. Bushey; she is to act as trustee of the share devised, while in case of the other daughters, the executor is made the trustee. A trust is created in the will for all of their respective children. By the express language used, the parents are only entitled to the annual interest for life, and at their respective deaths the devisees are in remainder as provided in the will. See McDevitt's Appeal, supra; Affolter v. May, 115 Pa. 540; Gross' Adms. v. Strominger, 178 Pa. 64; Good v. Fitchthorn, 144 Pa. 287; Presbyterian, &c. Missions v. Culp, 151 Pa. 467.

The auditor therefore erred in holding that Ida C. Bushey has an absolute estate in her legacy, and in awarding it to her absolutely.

The report, so far as the award of the share of Ida C. Bushey, is set aside and the legacy is ordered to be paid to her only, upon her giving security as required in case of devises of life estates in personalty, or that it be invested in a mortgage or judgment in accordance with the direction in the will, the executor seeing that the same is properly and safely executed and entered or recorded, securing the fund.

COMMON PLEAS.

In Re United Brethren Hebrew Congregation.

Charter—Conflicting applications—Violation of agreement.

An application was made for the incorporation of a religious society. Subsequently a second application was made by another set of subscribers for the incorporation of a society by the same name. In answer to a rule, the petitioners in the second application averred that at a meeting at which some of the petitioners in the first application were present, the society was duly organized, trustees elected, funds subscribed and paid, and all agreed that these funds should be the property of the organization then forming: and that the first application was made against the wishes and rights of the society as organized at that meeting. HELD, that epplication number one must be refused.

The first application was defective in not setting forth the names and residences of the subscribers thereto.

The first application must also be refused because a majority of the applicants are acting in violation of their agreement to abide by the action of the congregational meeting.

It is no ground for refusing an application for a charter for a Religious Society that it contains no provision for the enactment of by-laws or for the admission or expulsion of members.

Application for charter.

This was a contention between two applications for a charter of a religious society by the same name.

Application No. 1 reads as follows:

We, the undersigned subscribers, all of whom are citizens of the Commonwealth of Pennsylvania, and associates, having formed a congregation in the City of York, Pennsylvania, for the purpose of worshiping Almighty God according to the faith, doctrines, discipline and usages of the Orthodox Hebrew Church, and being desirous of becoming incorporated agreeably to the provisions of the Act of General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the Incorporation and Regulation of certain Corporations," approved the 29th day of April, A. D., 1874, and its supplements, do hereby declare, set forth and certify that the following are the purposes, objects, articles and conditions of our said association for and upon which we desire to be incorporated, to wit:

First, The name of the corporation shall be "The United Brethren Hebrew Congregation, of York, Pa."

Second, Said Corporation is formed for the purpose of the worship of Almighty God, according to the faith, doctrine, discipline and usages of the Orthodox Hebrew Church.

Third, The location of said Corporation, and place wherein its business is to be transacted, is the City of York, York County, Pennsylvania.

Fourth, The Corporation is to have perpetual existence.

Fifth, The Corporation has no capital stock. The membership thereof shall be composed of the subscribers and their associates, and of such other persons as may from time to time be admitted by vote, in such manner, and upon such requirements as may be prescribed by the By-Laws. The said Corporation shall, nevertheless, have the power to exclude or suspend members for such just and legal causes, and in such legal manner, as may be ordained and directed by the By-Laws.

Sixth, The oversight and management of said corporation shall be vested in a Board of three Trustees, a majority of whom shall be laymen, and such officers of the Corporation as the By-Laws may prescribe. The said Trustees shall be elected annually by the adult male members of the Corporation from among the adult male members of the same on the first Monday of October of each year, between the hours of 1 and 3 o'clock P. M., at the house of worship of said Corporation. The said Trustees shall hold their office until the first Monday of October in the succeeding year, and until their successors are legally elected. The names and residences of those chosen Trustees for the first year, and who shall hold office until the annual election on the first Monday of October A. D., 1898, are: Charles Schultzinger, Isaac Gross. York, Pa.; Jacob Fedder, Lower Chanceford Township, York County, Pa.

The Corporation shall have power to hold, purchase and transfer such real and personal property as may be bequeathed, devised or purchased and conveyed to it, and as its purposes may require, not exceeding the amount limited by law, and shall be taken, held, enure thereto, subject to the control and disposition of the lay members thereof or such constituted officers and representatives of the same as shall be composed of a majority of lay members, citizens of the Commonwealth of Pennsylvania, having a controlling power according to the rules, regulations, usages and corporate requirements of the Corporation.

Seventh, The By-Laws of this Corporation shall be deemed and taken to be its law, subordinate to the statute aforesaid, this Charter, the Constitution and Laws of the Commonwealth of Pennsylvania and the Constitution of the United States. They shall be altered and amended as provided for by one of the By-Laws themselves, and shall prescribe the powers and functions of the Trustees; the time and place of meeting of the Trustees and of the Corporation not hereinbefore provided for; the number of members who shall constitute a quorum at the meeting of the Corporation; the qualifications and manner of electing members; the manner of selecting officers, and the powers and duties of such officials, and all other the concerns and internal management of the Corporation.

Application No. 2 was as follows:

In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the Incorporation

and Regulation of certain Corporations," approved the 29th day of April A. D., 1874, and the supplements, the undersigned, all of whom are citizens of Pennsylvania, having associated themselves together for the purpose of the support of public worship, and desiring that they may be incorporated according to law, do hereby declare, set forth and certify:

First, The name of the proposed corporation is "The United Brethren Hebrew Congregation of York, Pa.

Second, Said corporation is formed for the purpose of the support of public worship according to the faith, doctrine, discipline and usages of the Orthodox Hebrew Church.

Third, The business of said corporation is to be transacted in the City of York, York County and State of Pennsylvania.

Fourth, Said corporation is to exist perpetually.

Fifth, The names and residences of the subscribers hereto are as follows:

[Here follows the list of subscribers.]

Sixth, The number of trustees, or directors, of said corporation is three, a majority of whom shall be lay members and citizens of Pennsylvania, and the names and residences of those who are chosen trustees for the first year are as follows: Jacob Feder, Woodbine, York County, Pa.; Abraham Trattner, Charles Schultzinger, York, York County, Pa.

Seventh, The corporation shall have no capital stock.

Eighth, The yearly income of said corporation, other than that derived from real estate shall not exceed twenty thousand dollars.

Ninth, Whensoever any property, real or personal, shall be bequeathed, devised or conveyed to said corporation or to any ecclesiastical corporation, bishop, ecclesiastic or other person for the use of the same or of religious worship or sepulture, said property shall not be otherwise taken and held, or enure, than subject to the control and disposition of the lay members of said The United Brethren Hebrew Congregation, of York, Pa., or such constituted officers or representatives thereof as shall be composed of a majority of lay members, citizens of Pennsylvania, having a controlling power, according to the rules, regulations and requirements thereof, so far as consistent with the Act of the General Assembly, of the Commonwealth of Pennsylvania, entitled, "An Act relating to corporations and to estates held for corporate, religious and charitable uses," approved April 26th, A. D., 1855, and the supplements thereto and amendments thereof.

Both applications having been presented, the Court granted a rule on No. 2 to show cause why No. 1 should not be granted. To this rule the following answer was filed:

For an answer to the rule on Jacob Feder, Abraham Trattner, Samuel Feder, Isaac Trattner, Joseph Forner, Nathan L. Hirschfeld, Wolf Mintz, Abraham Forner, Meyer Fink, Marcus Karpf, Moses L. Gotlob, Harry Freidman, Joseph F. Zeigler, Harry N. Trattner, Benjamin Feldman and Abraham Hochberger to show cause why a charter under application No. 1 of Charles Schultzinger, Isaac Gross, Michael Leibowitz, Joseph Hochberger and Solomon Roth for the same to be called "The United Brethren Hebrew Congregation of York, Pa." should not be granted, said respondents say:

That a meeting was held in the City of York in said county prior to August 26th, 1897, a few days, by eighteen persons including all the respondents except three, Samuel Feder, Moses L. Gotlob and M. Fink and including but two of the petitioners said Charles Schultzinger and Isaac Gross for the purpose of organizing a church corporation for the support of public worship in accordance with the faith, doctrine, discipline and usages of the Orthodox Hebrew Church, a fund of over $700 having been previously procured by subscription by certain of the persons participating in the meeting, to wit: by Jacob Feder, Isaac Gross, Charles Schultzinger, Marcus Karpf, and by Samuel Feder and Mrs. Charles Shultzinger besides additional moneys subscribed and paid into the organization on the day and at the time of the meeting of members present, all to be applied to the uses of said church, all the persons participating in said meeting, including said Schultzinger and Gross agreeing that said fund should belong to and be the property of the organization then forming and met together and appropriating the same thereto.

All the persons participating in said meeting agreed to abide by the action

taken by said meeting, whereat, among other things it was ordered that the trustees elected at the meeting take such action as was necessary to procure a charter for the organization under the name, style and title of "The United Brethren Hebrew Congregation of York, Pa.," and Jacob Feder, Abraham Trattner and Charles Schultzinger were then and there elected trustees or directors of the corporation to serve for the first year In pursuance of the foregoing an application in due form has been made to this court for a charter as aforesaid by the respondents which said application was filed in open court September 1st, 1897, and Monday, September 27th, 1897, at 10 o'clock a m., was fixed by the court for making the application and hearing the same, the court further directing that notice of said intended application be given meantime by advertisement in manner provided by law. Said notice was given and said application was made accordingly and is now pending. Said Schultzinger and Hochberger were asked to sign the petition of the respondents but refused to do so. Said Gross was away from the said city at the time the application was prepared, signed and filed, and for that reason the respondents were unable to ask him to sign their said application. It is not now, nor has it ever been the purpose or desire or intention of the respondents to exclude any of the petitioners or any other person of the Orthodox Hebrew faith properly qualified from their said organization nor to deprive them in any way of the rights accruing to them by membership therein, and in fact they do now consider said Schultzinger, Gross and Hochberger members, and they are, unless by their own will and act the contrary shall be true, part and parcel of their, the respondent's, organization, said Schultzinger being in fact one of the trustees thereof duly chosen and elected at said meeting.

In violation of the agreements and election aforesaid, and in violation of their own personal agreement to abide by whatever action should be taken at the said meeting by the majority of the persons participating therein including the election of trustees to serve for the first year, said Schultzinger and Gross, after said meeting and election were held and said agreements were made associated with themselves three other persons, to wit: said Michael Leibowitz and Solomon Roth who had never previously been connected with any such proposed organization and Joseph Hochberger, who though not present at the meeting aforesaid signified his intention of becoming a member of the organization there formed, and made said application No. 1 for a charter without authority and without the consent or approbation of the respondents, but in opposition to their wishes and against their rights, and naming therein as a trustee Isaac Gross who was not elected as such.

The fund aforesaid is the property of the organization formed at the said meeting and was given and subscribed for the purpose of furnishing it with a place for public worship by the members thereof and the persons they might associate with themselves in accordance with the faith, doctrine, discipline and usages of the Orthodox Hebrew Church, which place of public worship when purchased was to become the property of the corporation to be created in accordance with the agreements made and resolutions passed at said meeting, and it is the purpose of the petitioners in making their said application No. 1, as the respondents are informed and believe, to forestall the respondents and in violation of their rights, in case the charter is granted upon their said application, to take, keep and use said moneys for themselves and such persons as they shall see fit to associate with themselves in their said corporation to the exclusion of the respondents or some of them or to use it in such manner as they shall see fit without allowing the respondents a voice in its disposition, in violation of the rights of the respondents.

Wherefore said application No. 1 is not authorized and not genuine and in violation of the rights of the respondents, and the application of the respondents is the only genuine and properly authorized application for the charter aforesaid.

Notice of said intended application No. 1 was not advertised in the YORK LEGAL RECORD.

Said application No. 1 does not set forth the residence of the subscribers thereto.

Said application No. 1 does not comply with the provisions of Section 7 of the Act of the General Assembly entitled

"An Act relating to Corporations and to Estates held for Corporate, Religious and Charitable uses," approved April 26th, A. D. 1855, and the supplements thereto and amendments thereof.

Wherefore the respondents respectfully pray the Court to refuse to grant a charter on application No. 1, that of the petitioners, and that a decree be made incorporating the respondents and their associates under application No. 2 wherein the respondents are petitioners.

Geise & Strawbridge for No. 1.

Chas. A. Hawkins for No. 2.

November 9, 1897. BITTENGER, P. J. —These two applications for charter of incorporation under the same name, were regularly advertised and presented to the Court. Number one was first in point of time, but objection was made on behalf of number two, and the hearing of both applications was continued to September 27, 1897, when a rule was granted upon the petitioners in number two to show cause why a charter should not be granted in number one. On October 2nd, 1897, an answer to the rule, was filed. [Given above.]

A replication was filed and a rule to take testimony on notice, was granted, and depositions were taken, and read on the argument, which substantially prove the averments of the answer. No testimony was presented to the Court by the applicants in number one.

It is thus made to appear to the Court, that not only is the charter number one defective in not setting forth the names and residences of the subscribers thereto, but that the application is made in bad faith, by Charles Schultzinger and Isaac Gross who had been trustees of the formerly United Hebrew Congregation, worshiping at different times in Fallon's Hall and in a hall on West Market Street.

At the meeting attended by themselves and sixteen others in August, 1897, referred to in the answer hereinbefore quoted, they agreed to abide by the action of the meeting. At that meeting it was ordered that the trustees elected, take such action as was necessary to procure a charter for the organization under the name of "The United Brethren Hebrew Congregation, of York, Pa.," and Jacob Fedder, Abraham Trattner and Charles Schultzinger were then and there elected trustees for the first year.

Jacob Fedder and Abraham Trattner are on application number two and Chas. Schultzinger, the other trustee, in bad faith as a seceder from the congregation, has associated with him Gross and three others, one or more of whom was not at the meeting of August 26, 1897, and applied in application number one, for a charter of incorporation. These applicants are acting against the great majority of the original congregation styling themselves The Orthodox Hebrew Congregation, and in violation of their rights. A majority of them are also acting in violation of their agreement to abide by the action of a majority of the members of said congregation, expressed at said congregational meeting.

For these reasons, and the further reason that the names and residence of the subscribers is not given, the charter upon application number one must be refused.

It is contended on behalf of the application number one, that the Court should refuse a charter in number two, because there is no provision in said proposed charter for the enactment of by-laws, and because no provision is made for the admission of members from time to time, or their suspension or expulsion, and generally, its terms are not sufficiently definite to enable the Court to judge of the propriety and legality of their proposed incorporation. To sustain this contention The German General Beneficial Association of Philadelphia, 30 Pa 155; and In re The Permanent Relief Association, 3 Dis. R. 236, are cited.

These cases are both for the charter of relief associations in which it is peculiarly necessary to define "the rights and duties of the members." The strictness required in such cases does not apply to charters for religious societies where there are no such complicated rights and duties as in cases of charter of Beneficial Societies. Further, the first case cited was decided in 1858, long before the enactment of the corporation Act of 1874, specifying what must be set forth in applications for charters, and providing for the adoption of by-laws for corporations; giving them ample power to pass by-laws

not in violation of the charter of incorporation, the Constitution of the United States and of Pennsylvania.

We think that the proposed charter number two fully complies with the requirements of the Act of 1874, and is sufficiently definite; that all matters omitted, may be expressed by the by-laws, provided for by the said corporation act; and there is where they properly belong.

For the reasons stated, we now, accordingly refuse a charter in application number one, and grant a charter in number two, and we have this day certified accordingly in number two, as required by the Act of April 29, 1874.

Schenley Park Amusement Co. v. York Manufacturing Co.

Depositions—Signing of—Reading of.

Depositions of witnesses were taken before a Notary Public, who certified that "the above witnesses were duly qualified and examined and subscribed their depositions." Exceptions were filed on the ground that four of the witnesses had not signed their respective depositions. After the filing of the depositions, plaintiff asked leave to file an amended certificate of the Notary, in which he certified that the depositions "were read over in full and at length by the different witnesses" and then signed. HELD, that the amendment will be allowed.

The signing of the depositions by the witness is not necessary.

The depositions were also excepted to on the ground that they were "taken down in short hand, by a stenographer and subsequently transcribed, and that it does not appear that the testimony returned was read to or by the witnesses, or the contents of any alleged deposition made known to the subscriber prior to affixing his signature." HELD, that as there is no allegation that the depositions are incorrect, the presumption is that they were properly reduced to writing and subscribed by the witnesses.

Exceptions to depositions.

Latimer & Schmidt for exceptions.

Niles & Neff, contra.

November 15, 1897. STEWART, J.—These depositions were taken under a rule before W. A. Challener, Esq., a Notary Public of the City of Pittsburgh, who certifies at the beginning thereof as follows: "Depositions of witnesses produced, sworn and examined by me the 21st day of September, 1897, &c. * * * by virtue of the annexed rule and notice. Present, Clarence Burleigh, Esq., Attorney for plff; Boyd Crumrine, Esq., Attorney for deft.; P. H. Glatfelter, President of defendant company."

At the completion of the testimony the Notary certifies as follows: "I hereby certify that the above witnesses were duly qualified and examined at the time and place stated in the above caption and subscribed their depositions in my presence, W. A. Challener, Notary Public Commissioner."

Exceptions are filed to these depositions on two grounds:—

1st. That four of the witnesses, Harry M. Edwards, John A. Hibbard, I. Logan Stewart and H. G. Harmer, have not signed their respective depositions.

2nd. That the depositions were taken down in short hand, by a Stenographer and subsequently transcribed, "and that it does not appear that the testimony returned purporting to be the depositions of the witnesses named was read to or by the several witnesses." * * * "or the contents of any alleged deposition was in any case made known to the subscriber thereto prior to affixing his signature."

After the exceptions to the depositions were filed, the plaintiff moved the Court for permission to file an amended certificate of the Commissioner in which he certifies further that the depositions "were read over in full and at length by the different witnesses before said witness signed the same and that after being so read over in full and at length the several witnesses signed their respective depositions in my presence."

I think it is within the province of the Court to permit this amended certificate to be filed and hence I allow it, but it does not seem to change the status of the matter materially. Notwithstanding this certificate to the contrary, the fact remains that the depositions of the four witnesses mentioned are not signed and if this were necessary the objection would be fatal as to their testimony. But this seems not to be essential. No act of assembly that I have been able to find requires the desposing witness to sign, and it was directly ruled by the Supreme Court in Moulson v. Hargrove that it was not necessary; 1st S. & R. 199; Morss v. Palmer, 15 Pa. 51.

Nor is the other objection fatal, but if it were it would be covered by the amended certificate. The defendants must be held to their exceptions. They do not allege that the depositions as returned are

incorrect or false, but that they were taken down in shorthand and transcribed, and that it does not appear that they were read to or by the witnesses, nor that they were not read, but that the record does not show this fact affirmatively. As was said in a similar case, "the depositions were taken in obedience to a rule of Court in presence of the parties, the witnesses cross examined, and we do not think the certificate fatally defective. In such case it is presumed that the depositions were properly reduced to writing and subscribed by the witnesses in the presence of the Justice, until the contrary is shown;" Winton v. Little, 94 Pa. 64; Piper v. White, 56 Pa. 90.

It is not averred in the exceptions that the Commissioner was not also the Stenographer. How this may be I do not know but even if the testimony was taken down in shorthand by a Stenographer, and then type written and afterwards certified by the Commissioner, in the presence of the Commissioner, it would be sufficient. The testimony need not be written down by the Commissioner; Crossgrove v. Himmelreich, 54 Pa. 203; Kellow v. Jory, 1 Northampton County Rep. 341.

The Commissioner certified that the witnesses were produced, sworn and examined by him and that they were duly qualified and examined and subscribed their depositions in his presence, and by the amended certificate that the depositions were read over in full and at length by the different witnesses. I am of opinion that this is sufficient to admit the depositions to be read, subject to objections as to their relevancy, materiality, &c., and I therefore dismiss the exceptions, to which the defendant excepts and I seal a bill of exceptions.

Rebman v. Shelley.

Will—Construction of.

The testator devised his real estate to his son Samuel in fee. "Subject nevertheless to the following restrictions, reservations and payments, namely, to pay unto my daughter Susanna and to her heirs and assigns the sum of three thousand and three hundred dollars in manner following, to wit, the one-half of said amount in the next year after my death, and the residue being sixteen hundred and fifty dollars in five annual payments * * * * and the three thousand three hundred dollars to be a lien on said land bequeathed to my said son Samuel until the same shall be fully paid and satisfied." By a subsequent clause in the will he provided that "if my daughter Susanna should die before her husband and having no children back that the money that I bequeathed her shall fall back to my son Samuel's children and be equally divided among them immediately after my death." The said money was never paid by Samuel Feiser to Susanna, although he accepted the real estate on which it was charged. Subsequently he made an assignment for the benefit of creditors, and this real estate was bought by the defendant. Susanna's husband having died, and she being childless, never having had any children, brought suit to recover the sum charged on the land. The affidavit of defence averred that Susanna was not entitled to the principal, but only to the interest. HELD, that the affidavit is sufficient.

If she died before her husband, and leaving no children back, the legacy should fall back to Samuel's children. If she survived him, she could dispose of it as she pleased; Rebman's Appeal, 1 YORK LEGAL RECORD 93.

Motion for judgement for want of a sufficient affidavit of defence.

Plaintiff's statement was as follows:

York County. ss:—The plaintiff by her attorney, James Kell, Esq., files the following statement of her demand and the amount claimed by her from the defendant, and in support thereof, makes the following specific averments of fact, and the following particular reference to the records of the office of the Register for the probate of wills in and for York county aforesaid, also the following particular reference to the records of the office of the Recorder of deeds in and for said county; the following particular reference to the records of the Orphans' Court of said county, and the following particular reference to the records of the Court of Common Pleas of said county, in lieu of copies of the instruments of writing recorded in said county, upon which the plaintiff's claim is founded, to wit:

The plaintiff avers that she is the widow of Joseph Rebman, late of Dover township, York county in the State of Pennsylvania, deceased, and that she is a child and legatee named in the last will and testament of her father John Feiser, late of Dover township, aforesaid, deceased.

That the said John Feiser died June 17, 1876, testate, leaving surviving him two children, to wit, Samuel Feiser and Susanna Rebman, (the plaintiff,) wife of said Joseph Rebman.

That the said John Feiser, in his life time made his last will and testament in

writing, bearing date October 17, 1865, wherein and whereby he gave, devised and bequeathed, inter alia, as follows, to wit:

"*Thirdly.* I give and bequeath unto my son Samuel Feiser and to his heirs and assigns for ever, all my real estate consisting of two separate tracts or pieces of land both situate in Dover township aforesaid, the first containing one hundred and ten acres, more or less, adjoining lands of George Feiser, Sr., Edward Daron, Jacob Hoftheins and others; the other being mountain timber land containing twenty eight acres, be the same more or less, adjoining lands of John Krone, Samuel Delp and others. * * * Subject nevertheless, to the following restrictions, reservations and payments namely to pay to my daughter Susanna and her heirs and assigns, the sum of three thousand and three hundred dollars, in manner following, to wit, the one-half of said amount in the next year after my death, and the residue being sixteen hundred and fifty dollars in five annual payments the first payment to be made on the first day of April a year after my decease, and the second, third, fourth and lastly payment on each succeeding first day of April after the first payment is made and the three thousand three hundred dollars to be a lien on said land bequeathed to my said son Samuel until the same be fully paid and satisfied."

"*Fifthly.* It is my will if my daughter Susanna should die before her husband and leaving no children back, that that money that I bequeathed her shall fall back to my son Samuel's children and be equally divided amongst them immediately after her death."

And of his said will appointed his said son Samuel Feiser executor.

That the said last will and testament was duly proved before the Register for the probate of wills in and for said county June 21, 1896, and remains on file in the office of said Register at York, in and for said county, and of record therein in Will-Book "Z," page 696, letters testamentary thereto having been granted to Samuel Feiser, executor therein named.

That the said Samuel Feiser took upon himself the duties of executor of said will and accepted the devise of the said real estate of the testator subject to the lien of said three thousand three hundred dollars bequeathed to said Susanna Rebman, the said plaintiff, in and by said last will and testamemt.

That afterward, to wit, March 11th, 1878, the said Susanna Rebman presented her petition to the Orphans' Court of said county, praying the Court to award a citation to said Samuel Feiser to show cause why he should not pay over to her the said legacy absolutely, which petition is recorded in the office of the Clerk of said Orphans' Court in Orphans' Court Docket "U U," page 465. That upon the hearing on said petition the Court declined to order the payment of said legacy to her as prayed for in her said petition, *vide* the decree of said Court on said petition made April 12, 1879, and recorded in the office of the Clerk of said Orphans' Court in Orphans' Court Docket "V V," page 566. That on an appeal from said decree to the Supreme Court, taken by said Susanna Rebman, May 19, 1879, the said decree of the Orphans' Court was affirmed, *vide* the remittitur in said case filed in said Orphans' Court, May 23, 1879.

The said appeal and the opinion of the Supreme Court affirming the decree of the Orphans' Court are published as "Rebman's Appeal." in YORK LEGAL RECORD, August 5th, 1880, Vol. 1, page 93. Also as "Feiser's Estate" in "Pennsylvania Supreme Court Cases," 1 Walker, page 256.

That the said legacy of three thousand three hundred dollars remains charged on the said real estate of the testator, the said John Feiser, deceased.

That the said Samuel Feiser afterwards made an assignment of all his estate, including the said real estate on which said legacy is charged, in trust for the benefit of his creditors, by deed of voluntary assignment executed and delivered to Henry Longenecker on the 15th day of January, 1889, and recorded the same day in the office of the Recorder of deeds at York in and for said York county, in Record-Book "8 J," page 184.

That said Henry Longenecker, assignee as aforesaid, in pursuance of power and authority in said deed of assignment, and on order of said Court of Common Pleas, sold at public sale, on the 23rd day of November, 1889, the real estate of said Samuel Feiser on which the legacy of Susanna Rebman, the plaintiff, is a

lien, to Charles M. Shelley, the said defendant, subject to the lien of said three thousand three hundred dollars, which sale was duly confirmed by the said Court of Common Pleas March 15, 1890, and recorded in the office of the Prothonotary of said county in Assigned Estates Docket No. 9, page 358.

That Charles M. Shelley, the defendant, took possession of said real estate on the first day of April, 1890, in pursuance of the sale thereof to him as aforesaid, and now owns and occupies said real estate subject to the lien of said three thousand three hundred dollars, under the provisions of the last will and testament of John Feiser, deceased.

The plaintiff further avers that she is the same person mentioned in the said last will and testament of her father, John Feiser, deceased, as "my daughter Susanna." to whom the said testator gives and bequeaths, in and by said will, the said legacy of three thousand three hundred dollars, and that she, Susanna Rebman, the said plaintiff, has no children.

The plaintiff further avers that her husband the said Joseph Rebman died on the 29th day of July, 1897, leaving surviving him a widow. the said Susanna Rebman, the plaintiff, who was and is childless, she never having had any children, whereupon the said legacy of three thousand three hundred dollars, given and bequeathed to her by her father said John Feiser, deceased, and charged on the said real estate of Charles M. Shelley, the defendant, became due and payable to said Susanna Rebman, the plaintiff, under the provisions of the last will and testameent of her father said John Feiser, deceased.

The plaintiff therefore claims damages in this suit from the said defendant, in the said sum of three thousand three hundred dollars, with interest thereon from the first day of April, 1897, and avers that the defendant is not entitled to any credit or set off against her said claim.

The plaintiff further avers that the said defendant hath hitherto neglected and refused to pay the plaintiff the said three thousand three hundred dollars, with interest, or any part thereof, and still continues to refuse to pay the same, though often requested so to do, and therefore brings this suit.

The affidavit of defence was as follows:

York County, ss:—Charles M. Shelley, the above named defendant, being duly affirmed, says that he has a just and legal defense to the whole of the plaintiff's demand in this action, the nature and character of which are as follows:

That it is true that John Feiser in his lifetime made his last will and testament in writing, bearing date October 17th, 1865. in which he provided among other things for Susanna Rebman as stated in the provisions of his will and copied in the plaintiff's statement.

But your deponent denies that the said Susanna Rebman is now, or was at the time of the death of her husband entitled to the payment of $3,300.00 charged upon your deponent's land.

That under said will the said Susanna Rebman, now of the age of sixty-seven (67) years, is not entitled to said sum of $3.300 00 absolutely, but only to the interest thereof during her life; and that upon the death of the said Susanna Rebman, the principal is payable, under the terms of said will, to the children of her deceased brother, Samuel Feiser, all which this defendant expects to be able to show and prove upon the trial of said cause.

James Kell for motion.

E. W. Spangler, contra.

November 15, 1897. STEWART, J.—Upon the authority of Rebman's Appeal, 1 YORK LEGAL RECORD 93, judgment is entered in favor of the plaintiff and against the defendant for the sum of three thousand three hundred dollars, with interest thereon from April 1st, 1897, the amount to be computed by the Prothonotary.

C. P. of Lancaster County.

Bruenninger vs. Pennsylvania Railroad Co.

"Stop look and listen"—Contributory negligence.

In an action against a railroad company to recover damages occasioned by the plaintiff's wagon being struck by a train while being driven across the railroad at a public crossing by the plaintiff's driver, the driver testified that he first stopped, looked and listened, at a point about fifty feet from the track, where he had an unobstructed view of the track in the direc-

tion from which the train came, for about five hundred feet, and kept looking until he got to the track. HELD, that the driver was guilty of contributory negligence, as if he had so looked he would have seen the train coming, and a non-suit was properly entered.

Rule to strike off non suit.

Brown & Hensel, for rule.

H. M. North, contra.

October 25th, 1897. BRUBAKER, J.—We were moved to enter the non-suit in this case from the testimony elicited from Henry Mowery, the driver of the injured team in question. It is substantially as follows:

The Harisburg Express on the Pennsylvania Railroad, eastward bound, on January 15th, 1896, at 8:18 a. m as it had reached the crossing at or near the station at Bird-in-Hand, on its regular schedule time, struck the team of the plaintiff, consisting of a pair of mules attached to a covered platform wagon loaded with bread, which the driver was delivering to the customers of his employer that morning. The train was running on the south track, which was the first track that the driver reached at the crossing. The witness says that he first stopped, looked and listened at a point about fifty feet south of this track, that he had to lean foward to look out from the wagon, and looked out both up and down the track from that point. The only obstruction to his view west, in the direction from which the train was approaching, was the railroad bridge. He leaned forward and looked till he got to the railroad, and that the last observation he made was just as he got to the track; just about as his team had stepped on the track. The plaintiff's witnesses show that the distance from the crossing to the railroad bridge west, to which place the driver of the team says he had a full view all along the track from his first step on the highway, was 418 feet. From the point of the accident on the track a man could be seen up the track in the same direction for a distance of 493 feet. There was no evidence as to the rate of speed of the train at the place of the accident. The regular stopping place for the train was at the Bird in-hand station, the distance of which from the place of the accident is not precisely given. One of the witnesses says it was about 450 feet. But from this fact alone the speed of the train could only be surmised. The fact of the driver having admitted that he had looked in the direction of the approaching train all the way from the point at which he stopped till the team was just stepping on the track, although he says at the same time he did not see the train approaching, clearly establishes the fact of his contributory negligence. If he had looked, as he says, just as he was going on the track, he must have observed the train coming, and in time to have kept his team of the track. There is no evidence that the team was balky or in any manner uncontrollable.

We do not see how, in view of the facts and circumstances proven on the trial, this case could have been left to a jury. And, therefore, we refuse to strike off the non-suit.

Motion denied.

CIRCUIT COURT.

Circuit Court, W. Dis. Pa.

Frazer v. McConway & Torley Company.

Aliens—Taxation of—Penna. Act of June 15, 1897—Constitutional law.

The Pennsylvania Act of June 15, 1897, imposing a tax upon all employers of one or more foreign-born, unnaturalized male persons over twenty-one years of age within that State, and providing that such tax may be deducted from the wages of such alien employes, is clearly a tax upon the employe and not upon the employer, and is in conflict with the equal protection of the law guaranteed by the fourteenth amendment to the constitution of the United States and sections 1977 and 1979 of the Revised Statutes of the United States, in that it interposes, to the pursuit by such persons of their lawful avocations, obstacles to which others under like circumstances are not subjected, and places upon them burdens which are not laid upon others in the same calling and condition.

Demurrer to bill.

Thomas Paterson, (*N. S. Williams*, county solicitor, with him,) for demurrer.

James H. Reed of Knox & Reed, contra.

August 26, 1897. ACHESON, Circ. J.—The first section of an Act of Assembly of the State of Pennsylvania, approved June 15, 1897, provides: "That all persons, firms, associations or corporations employing one or more foreign-born, unnaturallized male person over twenty-one years of age within this commonwealth, shall be and are hereby taxed at the rate of three cents per day for each day of such foreign born, unnaturalized male person may be employed, which tax shall be

paid into the respective county treasuries; one-half of which tax to be distributed among the respective school districts of each county, in proportion to the number of schools in said districts; the other half of said tax shall be used by the proper county authorities for defraying the general expenses of county government."

It is further provided by the act: "That all persons, firms, associations and corporations shall have the right to deduct the amount of the tax provided for in this act from the wages of any and all employes, for the use of the proper county and school districts as aforesaid."

As the employer is authorized by the act to deduct from the wages of the em ployе the prescribed tax, it is quite clear that the tax is upon the employe and not upon the employer; Bell's Gap R R. v. Pennsylvania, 134 U. S. 232, 239.

The court is here called upon to consider whether these provisions of this Act of Assembly are in conflict with the constitution or laws of the United States. The fourteenth amendment to the constitution of the United States declares: "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The general purpose and scope of these constitutional provisions were thus stated by Mr. Justice Field, in delivering the opinion of the Supreme Court of the United States in Barbier v. Connolly, 113 U. S. 27, 31: "The fourteenth amendment, in declairing that no State 'shall deprive any person of life, liberty or prop erty without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or abitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of crimminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Congress has enforced the above provisions of the fourteenth amendment by legislation embodied in sections 1977 and 1979 of the revised statutes The former of these sections enacts: "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

It will be perceived that this statute, following in this regard the constitutional provisions themselves, embraces within its protection not citizens merely, but "persons" within the jurisdiction of the United States. The question of the extent of these constitutioual provisions with respect to persons was before the Supreme Court in Yick Wo v. Hopkins, 118 U. S. 356 369, and it was there decided that the guarantees of protection contained in the fourteenth amendment to the constitution embraced subjects of the emperor of China residing in the State of California. Mr. Justice Matthews, in delivering the opinion of the Supreme Court, there said: "The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, or color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

There can be no doubt that the fourteenth amendment embraces the case of the present plaintiff, who, although a

British subject, is, and since about April 2, 1893, has been a resident of the State of Pennsylvania, and whose right to reside within the United States is secured to him by treaty between the United States and Great Britain.

Can the tax laid by the Pennsylvania Act of June 15, 1897, be sustained, consistently with the principles enunciated by the Supreme Court of the United States in the cases which have arisen under the fourteenth amendment? I think not. This tax, as we have seen, is imposed "at the rate of three cents per day for each day each of such foreign-born, unnaturalized male persons may be employed." The tax is of an unusual character, and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign born, unnaturalized male persons over twenty-one years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations, obstacles to which others under like circumstances are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now, the equal protection of the laws declared by the fourteenth amendment to the constitution secures to each person within the jurisdiction of a State exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances; The Railroad Tax cases, 13 Fed. Rep. 722, 733. The court there, in discusing the prohibitions of the amendment, said: "Unequal exactions in every form, or under any pretence, are absolutely forbidden, and of course, unequal taxation, for it is in that form that oppressive burdens are usually laid." It is idle to suggest that the case in hand is one of proper legislative classification A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here; Gulf, Colarado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 165. Mr Justice Brewer, in delivering the opinion of the court, there said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

I am of the opinion the Act of Assembly of the State of Pennsylvania of June 15, 1897, here in question, is in conflict with the constitution and laws of the United States, and cannot be sustained.

The demurrer to the bill of complaint is therefore overuled.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Negligence—Responsibility of employer.—Upon the second trial of a case it is proper to read to the jury the testimony of a witness upon the former trial, the fact that the witness was beyond the jurisdiction of the court being established, although no effort may have been actually made to subpoena him. Where the injury complained of was due to the negligence of a fellow employe, and the evidence is sufficient to carry to the jury the question whether he was the vice principal, and the verdict of the jury is reasonable in amount, the court will not interfere.—*Giberson v. The Patterson Mills Company*, (Delaware C. P.) 7 Delaware County Reports 20.

Practice—Habeas Corpus—Hearing before trial—Evidence.—No hearing can be had upon a writ of habeas corpus in advance of trial if the petitioner is under bail and voluntary procures himself to be surrendered for the purpose of applying for release. No evidence for the defendant can be heard upon such hearing; Act May 23, 1887, sec. 1 P. L. 158. If any matter except proof of the commission of the offense is to be relied upon for discharge, the petition and return can be so framed as to make it issuable; Com. v. Kitner, 92 Pa. 372, and thus require the commonwealth to establish upon that proposition a prima facie case to hold the relator.—*Com. ex rel. Reeder v Fenide.* (Northampton C. P.) 6 Northampton County Reporter 94.

York Legal Record.

Vol. XI. JANUARY, 1898. No. 7.

SUPREME COURT.

Cleaver's Appeal.

Contract — Consideration — Restraint of trade.

Plaintiff brought suit to recover damages for the violation of an agreement not to engage in a certain business within a fixed territory. On the trial he showed an agreement on the part of the defendant to sell certain properties and business to the plaintiff and a subsequent conveyance of such properties and payment therefore. Afterwards the agreement on which suit was brought was executed, the previous purchase and conveyance being cited as the consideration for the record agreement. HELD, affirming the court below, that a non-suit was properly entered, the agreement in restraint of trade being without consideration and therefore void.

A contract in restraint of trade must be founded in a valuable consideration, must be reasonable, and must impose no general restraint upon trade and industry.

The previous sale being complete in all respect, the duty of the parties on both sides was clearly defined, and the obligation to perform it was comprehended within its express provisions. Hence the obligation of the parties under it could not be a consideration for the subsequent restraining agreement.

Appeal of Frank C Cleaver from the decree of the Court of Common Pleas of York County.

The facts involved are given in the following opinion of the Court below, Stewart, J.

This is an action of assumpsit brought to recover damages for the breach of a contract not to engage in the manufacture of butter nor the purchase or sale of milk, either as principal, or as an agent, or as an employee at any point within a radius of five miles from certain creameries, which the defendant had theretofore sold to the plaintiff for a period of five years from the date of the contract.

The plaintiff averred in his statement that in consideration of the purchase of said creameries, the defendant agreed not to engage, &c , and then set out the contract, which is as follows:

"This agreement made and concluded this 29th day of June, A. D. 1895, between Oliver J. Lenhart, of the County of York, State of Pennsylvania, hereinafter called the party of the first part, and Frank C. Cleaver, of the City of Philadelphia, party of the second part hereinafter mentioned, witnesseth: That the said party of the first part for and in consideration of the purchase and conveyance to the said party of the second part of two creameries, one situated in Dover Borough, the other situated in Kralltown, together with the machinery and leashold of one other creamery situated at Wellsville, all of these creameries being situated in the County of York, State of Pennsylvania, the receipt for which is hereby acknowledged by the said party of the first part: he, the said party of the first part does hereby agree with the said party of the second part that he will not engage in the manufacture of butter, nor in the purchase or sale of milk, either as principal, as an agent or as an employee at any point within a radius of five miles from any of the aforementioned creameries for a period of three years from the date of these presents.

Witness the hand and seal of both parties to these presents, the date above mentioned."

O. J. LENHART. (L. S.)
F. C. CLEAVER. (L. S.)

WITNESS:
R. O. LAUER.
E. D. BENTZEL.

The defence is that this contract is in restraint of trade and therefore illegal or at all events is in partial restraint of trade and therefore the plaintiff is bound to prove a sufficient consideration to support it; Keeler v. Taylor, 53 Pa. 467; Gompers v. Rochester, 56 Pa. 194; Harkinson Appeal, 78 Pa. 196.

The contract is under seal, but being in restraint of trade this does not avail the plaintiff; Gompers v. Rochester, 56 Pa. 194. It is necessary that the consideration of such a contract be established by clear and satisfactory evidence; Hall's Appeal, 60 Pa., 458. In view of these principals how stood the case at trial? The agreement sued on, recites: "That the party of the first part for and in consideration of the purchase and conveyance to the said party of the second part of two certain creameries, one situated in Dover Borough, the other situated at Kralltown, together with the machinery and fixtures, &c., contained in the above creameries, and in further consideration of the purchase of certain machinery and

leasehold of one other creamery, situated at Wellsville * * * * the receipt for which is hereby acknowledged, &c." The plaintiff proved the execution of the agreement and offered it in evidence and it was objected to upon the ground that no adequate consideration for it had been shown, and that the plaintiff's statement showed a previous agreement upon which the agreement in suit was based and therefore was incumbent upon the plaintiff to produce the previous agreement before offering the one in suit.

This previous agreement after some evidence as to the location of the creameries had been given, was produced and offered with the agreement in suit for the purpose of showing a consideration of the agreement in suit, and was objected to as not evidence that purpose, and both papers were excluded.

There was no offer to show that the agreement in suit was made at the time of the execution of the first agreement, which bore date June 9th, 1895, and that it was afterwards reduced to writing at the date of the agreement in suit, June 29, 1895, or that they together contained the whole agreement, nor was there any offer to show that any new consideration passed at the execution of the last agreement.

This left the agreement sued on without any consideration whatever, a mere voluntary undertaking, and was therefore under the authorities cited *nudum pactum* and void.

There was no evidence to be submitted to the jury and the motion for a compulsory non-suit was made and allowed. No reason has been shown why it should be taken off and the motion to do so is therefore refused.

From the refusal to take off the non-suit this appeal was taken.

E. D. Ziegler and *E. Dean Ziegler* for appellant.

J. S. Black and *E. D. Bentzel* for appellees.

July 15th, 1897. GREEN, J.—The consideration of the original contract dated June 6th, 1895, for the conveyance and sale of the creameries therein described, was the sum of $5,950 in money, which was to be paid for the properties. Nothing was said in that contract about any restriction upon the seller, Lenhart, in the conduct of the same business at any time or place. He did not become subject to any duty or obligation to abstain from carrying on the same business thereafter, and hence he was at perfect liberty to do so if he chose. It cannot, therefore, be said that it was any part of the consideration of the contract that Lenhart should not engage in the same business in the future. That contract was consequently completely performed when the conveyances were made and delivered, and money paid according to its terms. It necessarily follows that when the second agreement was made on the 29th of the same month of June, there was nothing left of the first agreement which could operate as a consideration of the second.

There is practically no dispute as to the law in regard to this class of contracts. The agreement in suit is a contract in partial restraint of trade. As such, under all the authorities, it must, as one of the essential elements, be founded upon a good and sufficient consideration. In Keeler v. Taylor, 53 Pa. 467, Woodward, C. J., delivering the opinion, said: "The general rule is that all restraints of trade, if nothing more appear, are bad. This was the rule laid down in the famous case of Mitchell v. Reynolds, 1 P. Wms. 181. But to this general rule there are some exceptions as, if the restraint be only particular in respect to time or place, and there be a good consideration given to the party restrained. * * * * The cases are fully collected in Smith's note to Mitchell v. Reynolds, 1 Smith's Leading Cases, and from them it will be seen that all such contracts to be good at law must be founded in a valuable consideration, must be reasonable, and must impose no general restraint upon trade and industry."

The same doctrine was repeated in Gompers v. Rochester, 56 Pa. 194, where Thompson, C. J., said: "Agreements in restraint of trade generally, are void. They are not so when limited in time, or partial in their operation, and when there is a sufficient consideration." And again in Harkinson's Appeal, 78 Pa. 196, Mercur, J., said: "It must be born in mind that agreements in restraint of trade generally are void. To give validity to them they must be limited in time, or partial in their operation, and be supported by a

sufficient consideration." Thus it will be seen that in all these utterances the necessity of a sufficient or valuable consideration is expressed as a requirement additional to the other requirements as to time and place. In all the cases it is also held that the restraining condition must not be involved, in any doubt or uncertainty, and all the elements necessary to its validity must appear affirmatively. An instance of this kind appears in the case of Hall's Appeal, 60 Pa. 458. It was was a written aggreement of sale of the stock and good will of an undertaking business in Philadelphia for $3,000, and the restraining condition did not appear in the writing, though there was a blank of seven lines left in the instrument, which it was contended, was left for the insert'on of such a condition, and there was some verbal testimony of that kind, and also that the seller had said it was unnecessary to have a written agreement to that effect, as he did not intend ever to go into business again in Philadelphia.

There was also some other verbal testimony to similar declarations of the seller made afterwards The case was a bill for an injunction to restrain the seller from again engaging in the same business in Philadelphia. Williams, J., delivering the opinion said: "We have no doubt of the validity of such a contract, as is alleged in the bill, if founded on a sufficient consideration, or of the power of the court to restrain its breach by injunction. Our doubt in this case arises from the insufficiency of the proof to establish the existence of the alleged agreement. It cannot be inferred from the sale of the good will of the business and it is expressly denied in the answer. The sealed agreement between the parties given in evidence by the plaintiff, contains no stipulation or covenant on the part of the defendant, either to retire from the business, or not to resume it again in the city of Philadelphia, and in this respect it fully corroborates and sustains the answer." The judge then shows that the verbal testimony was insufficient to establish the restraining condition and he proceeds thus, "As the alleged agreement is in restraint of trade its existence should be established by clear and satisfactory evidence, in order to justify the court in restraining its breach by injunction. There should be no doubt or uncertainty in regard to its terms, or the consideration upon which it was founded." Other cases are to the same effect as all of the foregoing, but it is not necessary to cite them.

In the present case there is no doubt about the terms of the restraining agreement. It is sufficiently specific as to time and place within which the restraint is to be operative. But it has no consideration to support it. The previous sale being complete in all respects, the duty of the parties on both sides was clearly defined, and the obligation to perform it was comprehended within its express provisions. The agreement in restraint was no part of its terms and there was no obligation on the part of Lenhart to restrain his operations thereafter. It was held in Wimer v. Overseers, 104 Pa. 317, that where a legal obligation exists, a cumulative promise to perform it unless upon a new consideration, is a nulity. Hence the obligation of Lenhart to perfect the sale under the first agreement and the obligation of Cleaver to comply with its terms could not be a consideration for the restraining agreement of the subsequent date. The latter paper was a mere voluntary agreement in restraint of trade and, as such, cannot have legal sanction. The assignments of error are all dismissed. Judgment affirmed.

St. Clair's Appeal.

Practice—Joint Debtors—Service.

In an action against joint debtors where only one of the defendants has been served, but it is not avered in the statement that the sheriff's return as to the other was nihil habet, and the attention of the court below was not called to the omission, the Supreme Court will sustain a judgment against the defendant served, and permit the statement to be amended nunc pro tunc so as to show that the other defendant had not been served.

Appeal from the decree of the Court of Common Pleas of York County.

The opinion of the Court below Stewart, J., on the motion for judgment for want of a sufficient affidavit of defense, will be found in C. & C. Electric Co. v. St. Clair & Allen, 10 YORK LEGAL RECORD 8.

From the judgment there entered, Stuart St. Clair, one of the defendants, appealed.

G. G. Fisher and *H. L. Fisher* for appellant.

J. S. Clark and *A. N. Green* for appellee.

July 15, 1897. STERRETT, C. J — Defendant's averments, as to the partnership between him and John D. Allen, the other joint maker of the note in suit, and the appointment of a receiver, etc., are not only too vague and indefinite, but they are also immaterial. It is not denied that the two defendant, St. Clair and Allen, individually, are the joint makers of the note in suit, nor is it claimed that, as such joint makers, they have any meritorious defense to the payment thereof If there be a receiver of the alleged firm, regularly appointed and qualified, and he is in anywise interested in this suit, he is doubtless competent to protect the interests thus committed to his care; but, so far as appears, he has no possible interest therein that can be made available to the defendants in this case or either of them.

The only property assigned error that is worthy of even passing notice rests on the bald technicality that plaintiff's statement contains no reference to the fact that the Sheriff's return, as to the defendant, John D Allen, is "nihil habet," etc. If the attention of the court below had been called to this at the proper time, an amendment would doubtless have been allowed, and the statement made to conform to the fact as shown by the record. There is no reason why it should not be done now with the same effect as if it had been done then. The amendment suggested by plaintiff company's counsel is accordingly allowed and made nunc pro tunc. The only ground—technical or otherwise—on which the validity of the judgment against this appellant can be questioned being thus disposed of, the judgment against him impleaded with John D. Allen not served, etc., is affirmed.

COMMON PLEAS.

C. P. of Northampton Co.

Frey v. Lilly.

Certiorari—Practice—Damages.

The cause of action stated above was not consequental but for breach of contract in which the measure of damages was the difference between the price paid to a stranger and that contracted for with the defendant.

As the demand did not exceed $5 33 there was no jurisdiction to refer to arbitrators under the Act of Assembly, March 20, 1810, so as to permit their decision to be entered on the docket of the justice. Consent cannot give jurisdiction in statutory provisions, and the magistrate was required to decide the matter himself.

Certiorari.

This was a writ of certiorari to a Justice of the Peace The plaintiff here was defendant below. The cause of action was stated in the transcript to be "for five dollars' damages in defendant refusing to deliver a beef as he had contracted to do, whereby the plaintiff, a butcher, in order to supply his customers, was obliged to purchase another at this advance." After both parties were examined before the justice, the defendant asked for referees, and arbitrators were selected, who reported in favor of the defendant, this plaintiff in error. The justice declined to enter this judgment, but determined the case himself and gave judgment for the plaintiff for the sum of $5.

A. C. Dewalt for palintiff in error.

O. H. Myers for defendant in error.

September 27, 1897. SCOTT, J.—The plaintiff here, and defendant below, challenges the jurisdiction of the justice as stated upon the record. But the cause of action is clearly one for breach of contract, in failure to deliver to defendant for market uses at the time appointed in the agreement, a certain quantity of beef; by reason of this default the plaintiff below was obliged to purchase elsewhere. The measure of damages would be the difference between the price paid, and the price for which the contract called for delivery.

The other ground of objection, supported by a brief, is that the justice proceeded to enter judgment, after award to referees submitted in favor of the defendant below. The record shows that the magistrate heard the parties, their proofs and allegations upon oath. Referees were then selected, met and reported. The justice refused to enter judgment upon this award for "irregularity in the hearing as neither the plaintiff or defendant was under oath." We need not pause to determine the validity of this reason. The right to *enter judgment upon an award* before a justice being statutory, can be effective only when the jurisdiction exists to refer to arbitrators. Referees may be appointed only when the demand exceeds $5 33, here it was but $5.00, and any proceeding before referees while the action was still pending before the

justice, was without authority for any purpose of judgment *upon the magistrate's docket.* Doubtless the action itself might have been withdrawn and a voluntary submission, as at common law. and award under it, would have been binding, but *judgment* could not be entered upon it, unless stipulated for the term of submission. Legal forms may be waived, and parties may be estopped by acquiescence in irregular action and proceedure, but consent cannot give jurisdiction to inferior and statutory tribunals, where the legislature has withheld it. If the magistrate had entered judgment upon the report of the referees, it would have been void. It follows that he was required, as confirmed by the statute, to proceed and determine the controversy himself. This conclusion disposes of all substantial matters of complaint in the exceptions.

The exceptions are dismissed at the cost of the plaintiff, and the judgment of the justice affirmed.

ORPHANS' COUR.T

Stahl's Estate.

Trustee—Creditor of—Lien on proceeds of sale.

Twenty-two years after the death of decedent, but immediately after the death of the widow, the children instituted proceedings in partition, and an order was granted to A, one of them, to sell the real estate, which sale was made, confirmed, and account filed and confirmed showing a balance of $1,395.92, which, as no debts were presented, was divided among the heirs, A retaining her share, and being duly discharged as administrator and trustee. Prior to these proceedings K entered a judgment against A. Almost two years after the discharge of A as trustee, K: presented his petition asking for a citation on A to pay the amount of the judgment or be attached. HELD, that the citation must be refused.

A sale under proceedings in partition discharges the lien of a judgment or mortgage entered against an heir of decedent.

While an administrator may apply to the court for the appointment of an Auditor to ascertain whether or not there are any liens against the real estate, so as to provide for and protect the same in the distribution, he is not compelled to do so.

The fact that A accepted the duties as trustee to sell the real estate did not make her a trustee for K, and compel her to stand guard for his money at the peril of her liberty.

To compel her to pay K or imprison her if she failed to do so, would be an abuse of the powers of the court and contrary to the Act abolishing imprisonment for debt.

Rule for citation to Amelia Keller to show cause why she should not pay certain moneys to Rufus Kurg or be attached.

The petition was as follows:

1. That on May 16th, 1873, William Stahl, late of said Borough of Hanover, died intestate seized in his demesne as of fee of a certain tract of land situate on Carlisle Street in said Borough, and fully described in the proceedings in partition hereinafter mentioned.

2. That said decedent left to survive him his widow, and three children, viz: Amelia Keller, Mary Jane Roberts and Maria L. Stahl; and that said tract of land descended under the intestate laws of this Commonwealth to the said three children of said decedent, subject to the dower interest therein of the widow of said decedent.

3. That while said Amelia Keller was seized of her undivided one-third interest in the fee of said real estate there was entered in the Court of Common Pleas of said York County, on May 25th, 1894, a certain judgment against said Amelia Keller and others in favor of your petitioner, to wit: the judgment of Rufus Krug v. Amelia Keller, L. V. Keller and Juliann Keller, No. 487 April Term, 1894, for $500 00, which then became a lien on the interest of said Amelia Keller in said real estate; and that the whole of said judgment remains unpaid and is due with interest from May 25th, 1894, and costs.

4 That after the entery of said judgment and while the same was still a lien on the interest of said Amelia Keller in said real estate, and after the death of the widow of said William Stahl, deceased, to wit: on March 27th, 1895, said Amelia Keller, Mary Jane Roberts and Maria L. Stahl petitioned the said court to appoint Jesse Frysinger, John Martin and Reuben Young as commissioners to make partition of said real estate between said petitioners, &c., and that thereupon said court appointed said persons as commissioners as prayed for, which said petition and order are recorded in the office of the

Clerk of the Courts of York County, Pa., in Partition Docket C, on pages 68 and 69.

5. That said Commissioners on April 15th, 1895, reported to said Court that said real estate could not be parted among said petitioners without prejudice to or spoiling the whole, &c., and that they had appraised the whole at the value of $2,100 00, which report was duly confirmed, and is recorded in said Partition Docket on page 75.

6. That on April 15th, 1895, said Amelia Keller, Mary Jane Roberts and Maria L. Stahl caused to be filed in said court their petition wherein they waived the issuing and serving of rules to appear and accept, &c., and prayed the court to issue an order authorizing and directing said Amelia Keller to sell said real estate under said proceedings of partition; upon which petition the court issued an order of sale as prayed for, the bond of said Amelia Keller having been filed and approved as required by law; said petition and order being recorded in said Docket on page 76.

7. That on June 3rd, 1895, said order of sale was continued by the court, and on October 21st, 1895, said Amelia Keller made return of said order of sale to said court that she sold said real estate to David Newcomer for the sum of $1,576.-00, which sale was duly confirmed by the court. Partition Docket C, page 176.

8. That at and immediately before the absolute confirmation of said sale of said real estate the above mentioned judgment of Rufus Krug v. Amelia Keller and others was the first lien upon the undivided one-third interest of said Amelia Keller in said real estate, and by the confirmation of said sale the lien of said judgment on said real estate became discharged, and your petitioner became entitled to receive so much of the share of said Amelia Keller out of the net proceeds of said sale as would be required to pay said judgment with interest and costs.

9 That said Amelia Keller subsequently filed her account of the proceeds of sale in the Register s office of said county, which account was presented to the court and became confirmed absolutely on March 31st, 1896, and is recorded in the Clerk's office of said court in Book 29, page 250; and that in said account said Amelia Keller accounted for no other funds, property or money than said $1,-576.00, the proceeds of said sale of said real estate; and that said account shows a balance of $1,395.92 for distribution.

10. That there were no debts of said William Stahl, deceased, at the time of the sale of said real estate for which said real estate was liable, or that were a lien on the same.

11. That your petitioner is informed and belilves and avers as a fact that said Amelia Keller has paid one-third of said balance on said account, or $465.30 to each of the said Mary Jane Roberts and Maria L. Stahl as their shares out of the said balance on said acconut, and that said Amelia Keller has retained out of said balance, the net proceeds of said sale of said real estate, and had appropriated to her own use the sum of $465.30 as her share of said balance.

12. That though the whole of said judgment with interest and cost still remains due and unpaid, and your petitioner has frequently requested her so to do, the said Amelia Keller has not paid to your petitioner any part of the proceeds of the sale of said real estate.

Your petitioner, having shown that he is entitled to receive from said Amelia Keller, trustee under said proceedings in partition, out of the balance of said account the sum of $465 30, therefore prays the court to issue a citation to said Amelia Keller, administratrix d. b. n. of William Stahl, late of said Hanover Borough, deceased, and trusteee to sell certain real estate of said decedent, to pay to your petitioner said sum of $465.30 with interest thereon from March 31st, 1896, or to appear in court and answer the allegations contained in this petition and show cause why she should not pay your petitioner said sum of $465.30 with interest thereon from March 31st, 1896, out of the balance for distribution on said account, and to submit to the order and decrees of the court, and your petitioner further prays the court to make such other and further orders and decrees as may be just and proper in the premises. And he will ever pray, &c.

To which the following answer was filed:

That true it is that your respondent was, on the 25th of March, A. D. 1895, duly granted letters of administration d. b. n. on the estate of Wm. Stahl, deceased, by the Register of Wills of said county,

immediately after the death of Kesiah Stahl, the widow of said William Stahl, the death of said widow occurring on the 20th day of March, 1895; That your respondent duly accepted said trust, and had inserted in the "Hanover Advance," a weekly newspaper, publlshed in said borough at that time, a legal notice to debtors and creditors of said estate, as well as in the estate of Kesiah Stahl, deceased, of which your respondent also became the administrator simultaneously.

2. That it is also true that in both of said estates, three heirs-at law survived said decedents, viz.: Amelia Keller, Mary J. Roberts and Maria L. Stahl, (now Flickinger,) and that after proceedings in partition duly had, the said Amelia Keller, as Trustee, on the 21st day of October, 1895, sold the real estate of said Wm. Stahl, deceased, to David Newcomer, for the sum of $1576, which said sale, under the rule of Court, four days after return thereof made to the Court, was confirmed absolutely; and which said real estate subsequently, to wit: on the 1st day of September, A. D. 1896, was sold and conveyed by said David Newcomer to the present owner thereof, viz.: D. W. Bange, of Hanover, Pa.

3. That it is true that there was a balance on settlement of her account of the proceeds of the sale of the real estate of Wm. Stahl, deceased, of $1395.92, which said balance, by the unanimous consent and agreement of the above-mentioned three heirs at-law, was distributed by your respondent, without the intervention of an Auditor, to and amongst the parties entitled thereto, on February 21st, 1896, and the money was then duly paid over, by your respondent's checks on the People's Bank of Hanover, Pa., payable to the order of the three heirs-at-law aforesaid; and the release of the said heirs was then and there duly executed to your respondent, and on the 24th day of February, 1896, the said releases were properly entered for record in the Recorder's office of York county, Pa., (see Record Book "10 L." page 226,) and are now remaining of record therein.

4. Your respondent further showing that Rufus Krug in his petition to the Court, studiously concealed from the Court the above fact and also the following matter of record, and specifically avers, that on the 13th day of April, A. D. 1896, the Orphans' Court, upon the petition and prayers of Amelia Keller, Mary J. Roberts and Maria L. Flickinger, the heirs-at-law aforesaid of Wm. Stahl, deceased, discharged the said Amelia Keller, as administratrix and trustee of said decedent, which said discharge now remains of record in Book "3 X," page 191, in the Clerk's office, in the Orphans' Court, in and for said county.

5. That it is not true as stated in the petition of Rufus Krug, that he "frequently requested said Amelia Keller to pay the judgment No 487, April term, 1894, for $500." But on the other hand your respondent alleges and says that at no time did the said Rufus Krug, the petitioner, from and after the date she took out letters of administration on the estates of Wm. Stahl and Kesiah Stahl, deceased, to the time of her discharge from said trusts, speak to her (the said Amelia Keller,) or demand from her any part of her distributive shares or interest, in either of the above named estates, to pay or satisfy the aforesaid judgment.

6. But your respondent further denies that the aforesaid judgment of Rufus Krug v. Amelia Keller, L. V. Keller and Julian Keller, (now deceased,) entered to No. 487. April term, 1894, for $500, was the first lien against the real estate of Wm. Stahl, deceased, or any interest therin of said Amelia Keller, your respondent; because of the folowing reasons, viz.:

a. That at the time the aforesaid judgment was entered of record, in the Common Pleas, Kesiah Stahl, the widow of Wm. Stahl, deceased, was still living, and resided in the above-mentioned real estate; and the said Rufus Krug, the petitioner, at that time, held said judgment against a valuable property situate on Baltimore street, Hanover Borough, said county, valued at $4,000, the title to which was then in the name of Amelia Keller, against which he had in his power and control sufficient property of said respondent, to fully pay and satisfy the aforesaid judgement in his favor.

b. That on March 20th, 1895, the date of the death of Kesiah Stahl, the aforesaid judgment of Rufus Krug was paid in full, and your respondent was not reliable thereon, to wit:

That on or about the 12th of Decem-

ber, 1894, Rufus Krug, the petitioner, come to L. V. Keller, husband of your respondent, and demanded payment of the interest due on said judgment of $500 for seven months, which said interest was then paid by said L. V. Keller, in cash. At the same, time said Krug demanded part payment of the principal of said judgment: and by agreement of all the parties thereto, it was then and there agreed and understood that the money should be borrowed from the People's Bank of Hanover, Pa., and the same to be paid on account of the aforesaid judgment of Rufus Krug; whereupon the said parties, to wit: Amelia Keller, L. V. Keller and Rufus Krug gave their joint and several promissory note to said People's Bank, for the sum of $60. which being renewed from time to time, on the 21st day of February, 1896, was paid by Amelia Keller; and was a credit on the aforesaid judgment.

And on the 6th day of February, 1895, the aforesaid parties, in pursuance of the same agreement and understanding, bor rowed the sum of $475, from the said People's Bank of Hanover, Pa., to pay and satisfy the balance remaining on the aforesaid judgment in said Rufus Krug's favor, together with interest and costs and a bonus of $35, as demanded by said Krug.

Your respondent further says that all said monies were duly paid to said Rufus Krug at the time above mentioned. in full satisfaction of the judgment No. 487, April Term, 1894, and that your respondent was not indebted to said Rufus Krug in any other sum of money at that time or since.

Your respondent therefore prays the Court to discharge said Rule at the cost of said Rufus Krug, the petitioner, or to give such other and further relief to her as may seem just and right. And she will ever pray, &c.

C. J. Dellone and *Allen C. Wiest* for rule.

C. M. Wolff, contra.

November 15th, 1897. STEWART, J. —This rule was heard on petition, answer and depositions. The facts found from the same are as follows: William Stahl died May 16th, 1873, intestate, seized of certain real estate in Hanover Borough, and leaving to survive him a widow and three children, namely, Amelia Keller, the respondent, Mary Jane Roberts and Maria L. Stahl. On March 25, 1895, after the death of the widow of William Stahl, the three children petitioned the Orphans' Court to partition the above mentioned real estate, which proceedings resulted in an order of sale granted to Amelia Keller upon which she sold the real estate and made return to the Orphans Court, which sale was duly confirmed, the purchase money paid, and an account thereof filed and confirmed showing a balance of $1,395.92.

It is alleged that there were no debts of William Stahl and although no proof on this subject was offered, it was not denied in the answer, and is very probably true inasmuch as he had been dead for upwards of twenty-two years at the time of the sale of the real estate.

After the confirmation of the account the balance was divided among the three children, Amelia Keller retaining her share and releases were duly executed and recorded, and on April 13th, 1896, Amelia Keller was regularly discharged by this court as administrator and trustee to sell the real estate of William Stahl, deceased.

On May 25th, 1894, Rufus Krug, who petitions for this citation, entered a judgment for $500.00, to No. 487, April Term, 1894, in the Court of Common Pleas of York County against Amelia Keller, L. V. Keller and Juliann Keller, which thereupon became a lien on the interest of Amelia Keller in said real estate; the other parties to said judgment being her husband and sister-in-law.

This judgment was reduced by a payment of $60 thereon and the amount now claimed to be due is $465.30 with interest from March 31, 1896. It appears from the testimony that Rufus Krug procured the defendant, her husband and perhaps some others, to give him a promissory note for this debt payable at bank, upon which they paid the discount and which was renewed from time to time, but which was never paid.

It is contended on the part of the respondent that this paid and satisfied the judgment, but there is no proof to support this proposition. These proceedings are instituted to compel Amelia Keller to pay this judgment out of the amount she realized from the sale of the real estate in

which she had an interest and the purchase money of which came into her hands as the trustee to execute the order of sale. Will the Court under these circumstances compel her to pay her debt?

A sale under proceedings in partition discharges the lien of a judgment or mortgage entered against an heir of a decedent; Steel's Appeal, 86 Pa. 222; Girard Life Ins. Co. v. Bank, 57 Pa. 388. And it is supposed that inasmuch as the sale had this effect that the plaintiff in the judgment has the right to demand payment of the same out of the funds in Amelia Keller's hands. That this would have been so had he diligently pursued his legal remedy may be admitted. Under the 49th Sec. of the Act of 29th of March, 1832, the Court may before approving a sale of real estate made under proceedings in partition, appoint an auditor to ascertain whether or not there are any liens against the real estate so as to provide for and protect the same in the distribution. It is said to be the duty of an administrator to apply for such an auditor, and further that it is permissive to do so, but not compulsory; Lucas' Appeal, 53 Pa. 404; Wistar's Appeal, 125 526; opinion of Judge Penrose on page 528.

No such request was made and no auditor appointed either before the confirmation of the sale nor to distribute the balance on the account, hence no decree has been made or sought requiring the trustee to pay any portion of the funds to the petitioner, but almost two years after the confirmation of the sale, and long after the account is filed, the money paid out and the trustee discharged, the petitioner wakes up and comes into court and seeks to enforce the payment of his debt by attachment and imprisonment. Upon what theory? There can be but one answer to this, namely that Amelia Keller is a trustee for the petitioner's use and as such has in her hands these trust funds belonging to him. As to him is she such trustee? As the record stands she is certainly his debtor. She was this before she accepted the duties of trustee to sell the real estate, but can it be said that this converted her into a trustee for him and compelled her to stand guard for his money at the peril of her liberty? He is not a creditor of the estate of William Stahl but her individual creditor, and he still has a creditor's right against her. There is no evidence to show that she knew that he held a lien on her interest in the real estate or had any claim to its proceeds, and she may have received and the presumption is that she did receive her share without any intention of defrauding or over reaching him.

Before the order of sale was granted, she occupied no trust relation toward her creditor; she has fulfilled the duties of the trust, received what was in fact her own, and been discharged by the order and decree of this court, no claim or demand having been made upon her while the trust lasted, and we are now asked to declare her a trustee for the benefit of this laggard creditor and to put him into the position to enforce by this harsh process, the remedy he might have had by due diligence.

I am inclined to think that it would be an abuse of the powers of this court to compel her by attachment proceedings to pay the plaintiff, or to imprison her if she failed to do so.

She is in my opinion protected from such a result by the terms of the Act of the 12th of July, 1842, abolishing imprisonment for debt; Ex Relatione Scott v. The Jailer, 1 Grant 237, as well as by Krug's laches.

I therefore discharge this rule and direct the petitioner, Rufus Krug, to pay the costs of these proceedings.

COMMON PLEAS.

C. P of Lackawanna Co.

The Finch Mfg. Co. v. The Stirling Co.

Corporation — Insolvency — Directors as Preferred Creditors—Executed Sale.

Insolvency as applied to a person, firm or corporation engaged in trade is inability to pay debts as they fall due in the general course of business.

A preference secured by a director from an insolvent corporation in favor of another corporation in which he is also a director, falls within the prohibition of the law and is fraudulent as to other creditors.

The knowledge that a company is probably insolvent is sufficient to put an end to the right of directors to prefer themselves as creditors to the detriment of others, but it does not prevent one director from accepting an advantage con-

ferred by the corporate authorities independent of himself and without his intervention or connivance, which works no disadvantage to the business of the company.

Where a sale of personal property had been made prior to a levy by the sheriff and the company selling the same had been given credit on the books of the party to whom it was sold, although delivery had not been made prior to the levy; HELD, that it was an executed contract and the property was not subject to levy by execution creditors of the company.

Semble: That in case of the fraudulent transfer of property by a failing corporation, a single creditor may test the validity of the transaction by levy and sale; it is not necessary to resort to proceedings in equity to set the transfer aside for the benefit of the creditor generally.

Exceptions to report of Referee.

This case was a Sheriff's Interpleader to determine the ownership of one Corliss engine, one split pulley, and two boilers. The property in question was levied upon by the sheriff of Lackawanna county at the shops of the plaintiff in the city of Scranton upon a fi. fa., at the instance of the defendant, upon a judgment against the Chamberlain Coal Company, who owned the property in dispute previous to November 27th, 1895. On that date the Chamberlain Coal Company, being indebted to the plaintiff in the sum of ten thousand dollars, proposed to the plaintiff that it take the goods mentioned, which were not necessary for the operation of the mining plant of said company, at a valuation of $2,100, to be applied upon the said indebtedness, which offer was accepted and credit given to the Chamberlain Coal Company for this amount. At the time of the sale and delivery of the property mentioned, I. A. Finch was a director of the Chamberlain Coal Company and also a director and president of the Finch Manufacturing Company, the plaintiff in this case.

Immediately after the sale to the plaintiff several executions were issued against the Chamberlain Coal Company and upon the hearing before the referee the defendant claimed that the company being insolvent, the sale and delivery of these goods was a preference which fell within the prohibition of law and was fraudulent as against other creditors. Further facts appear in the opinion of the court.

James W. Oakford for exceptions.
Alfred and *William J. Hand*, contra.

August 16, 1897. ARCHBALD, P. J.—

We do not understand how the referee could fail to find that the Chamberlain Coal Company was insolvent at the time of the transfer of the property in dispute. He seems to think, because the company was still struggling to keep alive and the crisis in its affairs which was imminent had not yet been reached, or as he expresses it, because it was still a "going concern," with estimated assets in excess of its liabilities, that it was not insolvent. This is a confusion of ideas. "Insolvency as applied to a person, firm or corporation engaged in trade is inability to pay debts as they fall due in the general course of business." Atwater v The American Exchange Bank, 152 Ill. 605; Levan's Appeal, 112 Pa. 294. That this was the condition of this company in October and November, 1895, is beyond question. With a paid-up capital of $260,000 and bonded indebtedness of $65,000 besides, its floating indebtedness at that time was $118,000 or nearly half as much more, with practically nothing to meet it except the general property of the company. Much of this indebtedness was, no doubt, being carried along in the hope that the company would extricate itself from its financial difficulties, but already in September some creditors had declined to renew the obligations which they held, and one at least had threatened suit. Attempts had also been made without avail to raise money for further necessary developments by a pledge of the transportation to market of the coal to be mined. These developments were essential to the life of the company because it was actually mining coal at a loss of from thirty to forty-five cents per ton and could not hope to better this until a higher output had been obtained. For evidence of the financial stress of the company we have but to turn to the minutes of the stockholders' meeting of October 17th, where Mr. Dickson, one of the directors, urged, that "Every effort be made to save the property for the company and that a committee be appointed to take up the question of finance and endeavor to secure the amount needed to pay off the Company's liabilities and to carry forward needed improvements." Surely the condition was serious if the property was even then in acknowledged danger of being lost to the Company. In addition to this it ap-

pears that to meet the wages due their employees the Company had been compelled to draw on the Gateridge Store Company, with whom they had intimate business relations, to the extent of ten thousand dollars, and on October 31st a judgment to secure this had been confessed. A judgment note of one thousand dollars had also been given to J. D. Stone for royalty, although the amount due him seems to have been somewhat in dispute. On either of these confessions the property of the company was liable to immediate execution and sale at the time in question and the crisis in the affairs was actually precipitated a few days later in this very way. The referee considers that it was the entry of these judgments that rendered the Company insolvent. but it is evident that this merely brought things to a head. The truth is that it was because of the already existing insolvency that the entering up of the judgments had that effect. The referee should, therefore, have found as he was requested that the Company was insolvent at the time of the transfer of this property, and the third, fourth and eighth exceptions must be sustained. The fifteenth exception is also sustained so far as relates to the affirmance by the referee that the evidence was not sufficient to establish the insolvency of the Company at that time.

We think the referee also erred in holding that a preference secured by Mr. Finch by virtue of his position as a director of the Chamberlain Coal Company in favor of the Finch Manufacturing Company in which he was a large stockholder, would not fall within the prohibition of the law, because it was not secured directly to himself, but to a corporation in which others were also interested. It cannot be that any such distinction as is thus suggested exists; if it does it lacks that common sense support which is supposed to underlie every ordinary legal judgment. The capital of the Finch Manufacturing Company is $250,000, of which Mr. Finch holds $228,700, or nearly eleven twelfths, while of the remaining $21,300 his son, W. I. Finch, holds $20,000. An advantage to the Company of which he was thus by far the principal owner was a direct and substantial benefit to himself and none the less so because some one else might also at the same time be benefited with him. It is difficult to see how the latter circumstance would remove the vice, if any, of the transaction. No authority is cited by the learned referee in support of his position and we question whether any can be found; nor is any substantial argument advanced by counsel to sustain it. On the contrary in Sweeny v. Refining Co., 30 W. Va. 443, we find the principle involved applied to just such a case as we have before us. There the directors of an insolvent corporation voted a conveyance of all its property to secure a debt due to another company of which certain of the directors who so voted were also directors, and it was held that the transaction was prima facie fraudulent as to other creditors. Without further discussion we sustain the ninth and tenth exceptions.

But notwithstanding the errors into which in these respects the referee fell, the controlling questions in the case were correctly ruled by him and the corrections made by the exceptions thus sustained by no means carry the case in the defendant's favor. The principle for which they contend and which they seek to have applied is thus set forth in Morawitz on Corporations, sec. 787: "Directors of an insolvent corporation who have claims against the company as creditors must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their powers as directors for that purpose. Their powers are held by them in trust for all creditors and cannot be used for their own benefit." And in Thompson on Corporations, sec. 6504, it is further said: "The only sound principle then is that the directors of the corporation cannot prefer themselves as creditors either when it is in fact insolvent or when its condition is such that the act is done in contemplation of insolvency. It is sufficient to put an end to the right of directors to prefer themselves as directors for them to know that it is probably insolvent." This doctrine appears to have been adopted in all its strength in our own State in Hopkins' Appeal, 90 Pa. 69; Neal's Appeal, 129 Pa. 64, and Kerstette's Appeal, 149 Pa. 148 The exact extent of it, however, is to be noted. It simply forbids a director

by virtue of his position from securing a preference to himself to the detriment of other creditors; it does not prevent him from accepting an advantage conferred by the corporate authorities independent of himself and without his intervention or connivance which works no disadvantage to the business of the company. It is in this later condition that the present case stands. The arrangement by which the property in question was transferred to the Finch Manufacturing Company to apply on the claim which they held against the Chamberlain Coal Company was proposed and carried at a meeting of the directors of the latter company. While Mr. Finch was there in his capacity as president, it is conceded that he did not bring up the measure nor vote upon it. The recitals contained in the resolutions show that it was purely a business arrangement advanced because of the advantage which would accrue to the Company thereby. "Mr. Finn moved that in view of the fact that we owe the Finch Manufacturing Company the sum of $13,000 and that we have an extra breaker engine and two boilers we are not using, we request them to take the same and credit our account with their value on our indebtedness.' This was just as legitimate, as a sale of any of its other property to any third party under like circumstances would have been. Mr. Finch is no doubt chargeable with knowledge of the insolvent condition of the Company, but it does not necessarily follow from this that the transaction is to be regarded as made in contemplation of its failure. The referee finds that it was not and we see no occasion to differ with him. While insolvent and seriously embarassed the Company had a valuable plant and really merely needed ready money to carry the point of success, which the directors seem all along to have been hopeful of doing. The bargain made, moreover, was a direct and positive advantage to the Company. It got rid of what they did not need and at the same time paid off so much of their debts. Had the Company been crippled or its business interfered with in any way by parting with the property a different question might arise, but of this there is, of course no suggestion. It was not, therefore, an undue preference secured by Mr. Finch in his own favor by virtue of his office in contemplation of the Company's failure and does not fall within the principle invoked. While he no doubt obtained an incidental advantage the moving motive was the advantage to the Company and the act was not his but that of the other directors. The second, sixth, sixteenth and seventeenth exceptions are overruled.

There is still the question of delivery. The resolution referred to was passed November 27th, and the goods were not forwarded to the Finch Manufacturing Company until December 6th and 26th following. In the meantime the Coal Company had failed and was in the hands of the sheriff. The referee finds, however, that on the same day that the action of the Coal Company was taken, an invoice of the goods was transmitted to the Finch Manufacturing Company who credited the Coal Company therewith upon their books at $2,100, their full value, and that the transaction was intended by both parties to be a completely executed contract as of that date. This was followed by the delivery of the property to the railroad company for its transhipment from Fort Carbon to Scranton, which followed. If, as is found, there was a complete legal bargain between the parties, valid when made, we see no reason for disturbing it simply because the delivery of the things bargained for was not made until after the affairs of the Coal Company had come to a crisis. This was merely the carrying out of that which had been not only agreed upon but which the Coal Company had gotten credit for, and a corporation is entitled to be honest even if it has failed. The first, fifth, eleventh, twelfth, fourteenth and the remaining part of the fifteenth exceptions are overruled.

The seventh exception is dismissed without discussion.

It follows from these conclusions that the plaintiffs are entitled to the fund in court and the thirteenth exception is also overruled.

As an additional reason why the defendants would not be entitled to recover, the referee advances the opinion that even if the transfer in question was fraudulent, a single creditor could not take advantage of it by levy and sale so as to secure the property for himself alone, this being accomplished only by a proceeding

in equity to set the same aside for the benefit of all. It seems to be so decided in Beech v. Miller, 130 Ill. 162, upon the ground—in part at least—that after the goods have passed from the hands of the corporation into the hands of the party to whom they have been transferred, an execution creditor of the corporation has no right to levy upon them. But our own decisions recognize the right of freely testing the title of a fraudulent vendee by means of execution and sale even when the property is in the hands of or claimed by a third party; Winch's Appeal, 61 Pa. 424; Davis v. Michener, 106 Pa. 395; Trevathan v. Ithaca Organ Co., 7 Pa. County Court 47; Maffley v. Iron Co., 2 Pearson 202; M. & M. Bank v. May, 1 Lack. Leg. Rec 500; Hartley v. White, 94 Pa. 31; and there would seem to be no reason why this might not be done with regard to the property of a private corporation, the same as of an individual. Reynolds v. Lumber Co, 169 Pa. 626; East Side Bank v. Tanning Co., 170 Pa. 1. It would require full and careful consideration before we could be justified in adopting the contrary conclusion. No exception squarely raises this question, however, and the case can be well disposed of without it. We do not, therefore, undertake to express an opinion upon it.

Except as modified by the third, fourth, eighth, ninth, tenth and part of the fifteenth exceptions, which are sustained, the report of the referee is confirmed and judgment is directed to be entered in accordance therewith.

C. P. of Lancaster Co.

In re School Directors of Colerain Township.

School Directors—Removal of by Court for abuse of discretion—Act of June 6th, 1893, P. L. 330.

The Act of 1893, relating to the removal of School Directors who have failed to provide proper accommodation for school children, confers a power of supervision of the discretion of School Boards on the State Courts which under the Act of 1854 the Courts did not have.

In Kirkwood, a growing and flourishing village, there were thirty-eight school children, while the three nearest school houses to the village were each about a mile and a half distant, and the seating capacity of these was insufficient to accommodate them, but the School Directors refused to provide better accommodations, and had reduced the tax rate to two mills on the dollar, or one-third of the average of the State. HELD, that there was an absolute necessity for a new school building in the village of Kirkwood, and the abuse of discretion of the School Directors was clear, and that they should be removed from office by the Court.

Rule to show cause why the Board of School Directors should not be removed from office by the Court.

On petition of residents of Kirkwood for the appointment of an inspector under the Act of June 6, 1893, the Court appointed Andrew M. Frantz, Esq., as inspector, who reported as follows:

The inspector to whom was referred the petition of Cyrus G. Barr, *et al.*, by virtue of the annexed certificate reports:

That, having fixed upon a time and place of meeting for the examination of the matter set forth in the petition hereto annexed, he gave notice to all the School Directors of Colerain Township, in said county, and others concerned, as the law requires, and that, at the time and place designated in said notice, viz: on Friday, the 18th day of June, A. D. 1897, at nine o'clock in the forenoon, at the public house of Isaiah Weller, in the village of Kirkwood, in said township of Colerain, he proceeded to investigate the matters referred.

All the School Directors of the township were in attendance, and quite a large number of citizens—probably not less than a hundred—and as many as wished to testify in the matter had the privilege to do so. Fourteen testified in behalf of the petition and thirteen against it. All the testimony given is hereto attached and made part of this report. There are, in all, nine schools in the township of Colerain. Three of the nine are located around Kirkwood, and all school children residing in the village are going to one or the other of those three schools. They are the White Plain, Salem and Union school houses. The investigation was, therefore, more particularly in reference to these three schools and the village of Kirkwood, as none of the others have any bearing in the matter. Besides taking the testimony of the witnesses which accompanies this report, he visited the three school houses named.

The petitioners set forth in their petition that—

1st. "They labor under great inconvenience by reason of the lack of proper school house facilities." There was no pretence of denying or contradicting this first allegation. It is simply a question of remedy. It is admitted on all sides that there is no school house nearer than one and a quarter miles, and that two of the the three schools named, where all the children of the village of Kirkwood must go, are one mile and a half distant. This is a great inconvenience—admitted to be so.

The second allegation of the petitioners, that the "said village (Kirkwood) is a flourishing and growing settlement and collection of houses," is admitted and uncontradicted.

The third. "That the children of the citizens thereof (meaning Kirkwood) are obliged to walk a mile and a half to school," is admitted and uncontradicted,

The fourth, "That the schools they attend are crowded" This is the only allegation in the petition that developed a difference of opinion. The weight of the evidence, as gathered from the testimony, shows that these schools have been crowded, and, under a thorough enforcement of the compulsory school law of 1895, would be overcrowded, and could not accommodate all the scholars bound at present to go to these schools named. We must presume that all the children will go to school, as the said law requires, and that provisions must be made for their suitable accommodation.

There is no contention about the allegations of the petitioners. The question then, is upon the truth of the allegations —whether, being true, they are sufficient in law to furnish relief to the petitioners under the Act of June 6, 1893, P. L. 330, which they invoke.

The testimony shows that there are thirty eight children of school age in the village of Kirkwood within a radius of a half mile from the centre. This is not contradicted. The common school law of May 8, 1854, is very comprehensive and beneficient in its provisions. The Act of June 6th, 1893, under which these proceedings are had, is auxiliary to the former Act. This Act of Assembly, in Section 23, placitum 2, in defining the duties of School Directors under it, provides "that they shall cause suitable lots of ground to be procured and suitable buildings to be erected, purchased or rented for school houses." The word "suitable" is very significant in this connection. The proper construction put upon it must be responsive to the general spirit of the school law as embodied in this Act. Suppose, for instance, that there were no school houses in and around Kirkwood, and the population located as it is at the present time, for several miles around, no one would, for a moment, suppose that the present sites would be selected. At the time these existing school houses were erected, the presumption is that they were properly located, the testimony showing that, at the time, there were only three houses in the village of Kirkwood. A B Worth, Esq, testified that these school houses were located as and where they now are sixty years ago, and that there were only three houses in what is now the village of Kirkwood, and that no additional school house facilities were furnished since that time. What was suitable sixty years ago may be very unsuitable now, and what was convenient then may be very inconvenient now. The people of Pennsylvania, or its citizens, have adopted the cause of common school education and have made it the great and leading object of their solicitude.

This investigation has developed the fact that the School Directors of Colerain township have not properly responded to the demands of the situation and have failed to give that encouragement to the schools of their district which the genius of the law demands They reduced the tax rate from 2½ mills on the dollar in 1895 to 2 mills in 1896, while the rate for 1897 is not yet fixed; they reduced the salaries of their teachers two dollars a month; there was no change of school house sites or locations in sixty years.

The school law authorizes an amount of tax to be levied annually equal in amount to the county and State taxes, which is 13 mills on the dollar for school purposes and an equal amount for building purposes, making in all 26 mills on the dollar. These Directors take the ground that the tax as now laid cannot be collected, and "how should the taxpayers pay if it was increased?" The provisions of the law are exceedingly liberal, and, while its full enforcement would seem somewhat severe, there should

be a willingness to keep pace with the progress of events, and when time and changes develop a necessity to conform to the process going on. Nothing has so much changed the condition of human affairs in townships, counties, states and nations, as the ever-shifting and movement of population. Entirely rural districts have been stationary, if not reduced, in population for some years past, while villages, towns and cities have wonderfully increased in population, creating a necessity for the readjustment of economic conditions in all relations. This has been the experience of Colerain township. The rural population has been stationary in numbers, while the lively little village of Kirkwood was growing and flourishing apace. Where it not for the Act of Assembly which the petitioners invoke, there would be no remedy for their grievances. These proceedings could not have been instituted under the Act of 1854, as was distinctly decided by the Supreme Court of the State of Pennsylvania in the case of Roth v. Marshall, 158 Pa. 272. The same Court has also decided that, under the Act of 1893, a remedy is furnished, which is pursued by the petitioners in this case. The case referred to is Cass' Appeal, 179 Pa. St. Rep. 24. In this case the Court held that the Act of 1893 conferred on the Courts of Common Pleas of this State a power by this new proceeding to ascertain the facts and determine whether the directors have exercised a sound discretion in providing suitable building accommodations for all the school children of the district.

The construction put upon the Act of Assembly under which these proceedings are had by the Supreme Court of Pennsylvania, in the case cited, seems to make it quite clear that the facts in this case bring it directly under the law, and that where, as in this case, it is shown that, in a village like Kirkwood, in Colerain township, where there are thirty-eight school children driven to the necessity of going to school one and a half mile distant into crowded school houses, the school directors of the district are not exercising a sound discretion in refusing to build a school house in or near such village for their more suitable and convenient accommodation.

The crowded condition of these schools, upon which point there is a contention, is a secondary matter. The main cause of the complaint is the distance, viewed in connection with the fact that all these Kirkwood school children start from a place where there are enough in number to make a school all close together.

It appears that these directors are determined to keep the school tax down as low as possible for want of means in the district. In this they seem to be encouraged and supported by a large number of the taxpayers. Is this the case in Colerain township?

The valuation of the township, which forms the basis for taxation for school purposes, was, in 1895, $900,640 00, and the tax levy, two mills and a half on the dollar, raising thereby $2,251.60 of school tax for the year. Is this the utmost limit that the exercise of a sound discretion would permit them to go? The average tax levy in the 2,443 districts in Pennsylvania for school purposes for the same year was 4.52 mills on the dollar, being nearly twice the amount per cent., and, in addition, the average building rate of levy in the State was 2-75 mills on the dollar. If the directors of Colerain township would be even with the average in the State, the amount of school tax raised in the township for schools and for buildings would have been $6,547.65, a fraction less than three times the amount their levy produced. If they had gone to the full limit the law allows for schools and buildings, the amount raised would have been $23,416.64, or ten times more than their levy yielded. From these figures it appears evident that the plea of lack of means in the district will not avail them.

The inspector finds also that the three schools among which all the school children of the village of Kirkwood are distributed are and have been inconveniently crowded.

And now, after hearing and considering the allegations and proofs offered to substantiate the charges set forth in the complaint, or to disprove them, and after having fully and diligently inquired into all the facts and circumstances bearing on the case in point, he finds that the Directors of Colerain township, Lancaster Co., Pa., have refused, neglected and failed, without valid cause for such refusal, neglect or failure on their part, to provide and maintain suitable and adequate ac-

commodations for the school children of the district as the law requires.

All of which is respectfully submitted.

Brown & Hensel for petition and rule.

B. F. Davis and *James M. Walker*, contra.

November 6, 1897. BRUBAKER, J.—This is a rule on the present Board of School Directors of Colerain township in this county to show cause why they should not be removed from office by the Court, and others appointed in their stead till the next annual election.

The rule is bassed upon the report of the inspector appointed by the Court under the Act of June 6th, 1893, P. L. 330, which reads as follows:

"Section 1. That whenever the school directors or controllers of any city, borough, township or independent school district shall willfully neglect or refuse to provide suitable houses, rooms or buildings in and for any school district within their jurisdiction, and under their supervision and control, with ample room and seating for the reasonable and convenient accommodation of all the school children residing in the district who may be in attendance, or who desire to attend the school or schools therein, then ten or more taxable citizens, residents of the said district, may set forth in writing the facts of the case, under oath or affirmation of at least six persons who sign the statement, and petition the Court of Common Pleas of the county in which said school district is situated, or in vacation any judge of the said Court, for the appointment of a competent inspector, and the Court or judge thereof may appoint such inspector, whose duty it shall be to visit the district by order of the Court or judge thereof, and inquire into the facts set forth in the complaint submitted, giving due notice to the members of the board of directors against whom the complaint for neglect of duty is made, and to other persons concerned, and the said inspector shall report to the Court or proper judge thereof, under oath or affirmation, of the result of his personal inspection and investigation, accompanied by statements of facts and proofs obtained in the case.

Section 2. If, after hearing the allegations and proofs offered to substantiate the charges set forth in the complaint or to disprove them, and after having fully and diligently inquired into all the facts and circumstances bearing on the case in point, the aforesaid inspector finds that the directors or controllers have refused, neglected or failed, without valid cause for such refusal, neglect or failure on their part to provide and maintain suitable and adequate accommodations for the school children of the district, as the law requires, he shall so report to the court or to the judge appointing him; and the court in such case is hereby authorized and empowered to grant a rule upon the directors or controllers then having jurisdiction in the district, or such of them as have willfully neglected or failed without justifiable excuse to perform the duties enjoined upon them by law, to show cause why the court or the judge thereof should not remove them from office and appoint others in their stead, until the next annual election for directors."

Under the school law of 1854, the courts of this Commonwealth have invariably refused to interfere with the discretion of school directors in all matters, especially in the building and location of school houses, for the reason that matters of discretion are not reviewable in law or equity. It is only in cases of bad faith equivalent to fraud that these courts would interfere, suggesting that the remedy for abuse of discretion was in the votes of the taxpayers at the polls. The Act of 1893, however, has expressly given to courts enlarged powers. Mr. Justice Dean, in delivering the opinion of the Supreme Court on an interpretation of this Act of Assembly, in re rule upon G. S. Walker *et al.*, Ross' Appeal, 179 Pa. 24, says, among other things: "There is no doubt, however vaguely expressed, that the legislature intended by the Act of 1893 to confer a certain power of supervision of discretion of school boards on the state courts, that, under the law of 1854, they did not therefore have."

And further on, in commenting upon the wording of Section 1, viz: "If the directors 'shall willfully neglect or refuse' to provide houses, rooms or buildings, then on petition of ten or more taxable citizens, the Court shall act." "This imposes upon the Court the duty," says Justice Dean, "through its own appointees, of investigation and putting upon record the facts and testimony. It

the inspector then finds that 'without valid cause' the directors have neglected or refused to peform their duty, he shall report. It will be noticed, the words 'willfully neglected and refused,' are here dropped, and the words, 'without valid cause,' substituted; words not by any means importing the same thing. If a duty be enjoined on an officer, his refusal to perform it is willful. He has no discretion as to its performance. But, if he be commanded to do a certain act, unless he have a valid cause for not doing it, and he then refuses for cause, the question is at once raised between him and his superior, whether the cause is sufficient to excuse him in his disobedience; it brings the judgment and discretion of the subordinate at once under the super vision of his superior, and further read ing of Section 2 bears out this view. It says, the Court is empowered to grant a rule on those directors who 'have failed without justifiable excuse' to perform the duty enjoined.'

This decision also settles another question raised in the same case; that is, that the finding of fact by the inspector is not conclusive, like that of an auditor, on the Court below. His reported conclusions are subject to a careful review on the rule to show cause on school directors, which the act of assembly authorizes, in case the inspector finds that the directors have refused, neglected, or failed to provide adequate accommodations, as required, 'without valid cause for such refusal, neglect or failure.' ''

We have very carefully examined the testimony and the report of the inspector in this case, because, we feel that the power given us by this Act of Assembly should be exercised only in a very clear case. The facts in this case, as we gather them from the testimony taken by the inspector, are plain, and clearly show that there is an absolute necesity for a new school house at the village of Kirkwood. The testimony shows, as the inspector says, that there are thirty-eight children of school age in the village of Kirkwood, within a radius of half a mile from the center, and that the nearest schools to said village, which these pupils now attend, are each a mile and a half distant, and that the seating capacity for all the school children residing within the district who desire to attend these schools is insufficient to accommodate them. These facts are uncontroverted. The testimony also shows, and the inspector so reports as the fact, that there has been no change in school house sites or locations during the past sixty years, and no additional school house facilities were furnished in that time, that the school tax rate in said district in 1895 was but two and a half mills on the dollar, which was reduced to two mills in 1896, and that the Board of School Directors had reduced the salaries of their teachers two dollars a month; while the school law authorizes an amount of tax to be levied annually equal in amount to the county and state taxes, which is thirteen mills on the dollar for school purposes and an equal amount for building purposes, making in all twenty-six mills on the dollar.

It seems to us that there could scarcely be a stronger appeal made to the legal discretion of a court than the one now before us. The abuse of discretion in this case is very clear, in our opinion, which compels us to make this rule absolute, the costs to be paid by the school district.

Rule absolute.

ORPHANS' COURT.

Strominger's Estate.

Life estate—Maintenance and funeral expenses.

Testator by his will bequeathed to his wife all his estate during her natural life, with power to sell the same and use the interest "and if insufficient for her own personal wants and comfort, then to take of the principal to make her comfortable, * * * and whatever is left at her decease after her just debts and funeral expenses are paid, is to be divided," &c. After the death of his widow, claims were presented against the estate on notes given by said widow for boarding and nursing, and also claims for expenses connected with the funeral. HELD, that they must be allowed.

The will gave the testator's wife a life estate, with power to consume the whole during her life, with remainder over if any, but such remainder over to be subject to the payment of her just debts, if any incurred for her support, and for the payment of her funeral expenses.

The evidence in the case shows capacity to execute notes in payment for board and nursing.

Exceptions to Auditor's report.

The substance of the report of the Auditor, H. L. Fisher, is as follows:

There are certain facts involved which are admitted, to wit: Especially those parts of the will of Henry Strominger in which he gives, devises and bequeaths to his beloved wife Margaret, all his real, personal or mixed estate * * * * "during her natural life; with power to sell the same, * * * * and use all the said interest if required for her own subsistence, and if insufficient for her own personal wants and comfort, then to take of the principal to make her comfortable, she to have full control of said money, the same as I would have if I was living, and whatever is left at her decease, after her just debts and funeral expenses are paid, the balance that is left is to be equally divided between my named children," &c., viz: * * * lie at the very foundation of the controversy; and there are others, which in the auditor's opinion are only of secondary importance to the above recited provisions of the will, in connection with what may be his findings of other material facts upon conflicting portions of the testimony held to be admissible in the case.

The language and terms of the testator's will are so clear, plain, unambiguous and strong as to the nature and character of the estate given his wife, which, though for the period of her "natural life" only (with remainder over) yet "*with full control of said money, the same as he would have if he were living*" that her right and power to use, expend and consume the whole for her own subsistence * * * personal wants and comfort during life have never been questioned. Testator's great and commendable care and concern for his beloved wife—"the principal object of his bounty"—do not stop, however with provisions for "her wants and personal comfort during life" but in language too plain for doubt or misunderstanding he makes the gift over of "the balance" equally subject to the payment of her just debts and funeral expenses.

The claims of Samuel Gross on two promissory notes (1 and 2) are expressed on their faces to be—the one "for taking care of me" (the aged and stricken widow) "through sickness;" the other (2) "for thirteen months boarding;" in other words, for her personal wants, comfort and subsistence. The other is for funeral expenses not exceeding about $——.

The learned counsel, for and on behalf of (contestant's) Rankin Strominger objects to the claim of Samuel Gross on the two promissory notes marked No. 1, for $500, and No. 2, for $104, offered in evidence, "First, because they are not claims for which the estate of Henry Strominger are liable," which the auditor understands to mean that testator's widow had no power under the will to contract a debt, or debts, for taking care of her through sickness, nor even for her boarding, ("subsistence") payable out of the actually unexpended part of her said life estate, although the will expresly provides for such payment, "*after her decease*" and *before* "the balance that is left" is to be divided among his children. To what other kind of liabilities could the phrase "her just debts" refer, or the words payment of them *after her decease* mean? What kind of debts could be more just, (if fairly and legally contracted for, or assumed,) than debts for nursing and boarding, or either, under the practically undisputed facts and circumstances disclosed by the evidence? None. The plain meaning and intention of the testator was and is, that out of any balance of his estate so given to his wife (or widow) that there might be at her disease her just debts incurred by her or at her request, for her own comfort, should be first paid, before the balance left, (if any) should go to his children.

The opinion of the Supreme Court in the case stated, Strominger's Appeal, 178 Pa. 70, by counsel on both sides, does not, in the auditor's view, conflict with his own as above expressed. The said First objection to the allowance of the two promissory notes, Nos. 1 and 2 is therefore overuled.

So also on the second, "that said notes were not made by Margaret Strominger as executor of the will of Henry Strominger, and which was but faintly, if at all pressed or insisted upon How, indeed, could she as "executor" make such a note or notes? For although she was by testator "nominated, constituted and appointed executrix of his will, and she accepted the trust and discharged the duties thereof during life, resulting in the sales of both personal property and real estate more than sufficient to pay debts of

testator and expenses of settlement of an account of the personal property, showing a balance of only $248.18 in her hands which being insufficient to pay debts of the testator, she sold the real estate under authority in the will, paid the said debts, but filed no account of the sale of the real estate; the balance of which however was to remain under her control and invested for her use and benefit and in her name to the time of her death, the securities held for and representing the same at that time amounting to $1,082, "subject to the just debts of the said Margaret Strominger," the same being the proceeds of the sale of the real estate of the testator, sold by said Margaret Strominger as aforesaid "and that said securities" promissory notes and certificate of deposit are all in the hands of Rankin Strominger, defendant in said case stated.

All of which stands admitted by E. W. Spangler, Esq., attorney for plaintiff, Rachel E. Gross, and James Kell, Esq., attorney for Rankin Strominger, administrator d. b. n. c. t. a. of Henry Strominger, deceased, the defendant.

As then, it thus stands solemnly admitted that the amount due on said promissory notes and certificate of deposit, viz, $1,082, was held "subject to the just debts and funeral expenses of the said Margaret Strominger," by Rankin Strominger, administrator d. b. n. c. t. a. of Henry Strominger, how can it be consistently or successfully denied that he now holds the balance, $881.69 of said $1,082, or $1,114.74 with accrued interest, as charged in his account filed, equally "subject to the just debts and funeral expenses of said Margaret Strominger."

The argument of the learned counsel for Rankin Strominger, administrator d. b. n. c. t. a., &c., appellant in the case stated, abounds and superabounds in citations of authorities as to technical rules of testamentary construction; but apparently unconscious of the inconsistency, they proceed thus:

"The pivotal point in the case is the intention of the testator."

"The intention must be gathered from the whole will taken together, and not from detached portions alone, &c."

"No words in the will are to be rejected if any meaning can be assigned to them, they must be construed so as to carry out the testator's intention, if it can be done consistently with the rules of law;" Seibert v. Wise, 70 Pa. 147. "All mere technical rules of construction must yield to the expressed intention of the testator, if the intention be lawful;" Beck's Appeal, 78 Pa. 433.

But, mere inconsistency rises to the dignity of absurdity in view of the counsel's utter disregard of these very same well settled rules and principles, all through their argument, in rejection of certain words, part of the first clause of this will, (in one of its four corners,) viz: "after her just debts and funeral expenses are paid." The whole of that particular part of the clause, and, on the whole and nothing less than the whole of which depends the proper decision of this controversy, reads thus: "and whatever is left at her decease, *after her just debts and funeral expenses are paid, the balance that is left* is to be equally divided between my named children, &c, viz, etc. All the words of the above underscored quotation, though admitted to be part of the will, are "rejected" from said argument; as also a confessedly correct construction of them, given by both counsel, thus: "That the amount due on said promissory notes and certificate of deposit is $1,082 (subject to the just debts and funeral expenses of the said Margaret Strominger,) *the same being the proceeds of the sale of real estate of the testator, sold by said Margaret Strominger as aforesaid*," and "That the said promissory notes and certificate of deposit are all in possession of Rankin Strominger, defendant in this case." Counsel for Rankin Strominger and other legatees, the present contestants, squarely admitting that said sum of $1,082, though every dollar of it was and is the proceeds of real estate sold by said Margaret Strominger, "*is* held by Rankin Strominger, *subject* to the just debts of and funeral expenses of Margaret Strominger, yet the learned counsel for appellant in the case stated, contended that though the life interest of Mrs. Strominger was, at first, in testator's whole estate, real, personal, and mixed, yet the remainder *actually unexpended at her death*, consisting, as it did, exclusively of the proceeds of the sale of *real* estate, whatever remains, any balance of the estate, *at her death*, must go to the testator's children, for that reason, being proceeds of real estate sold, "if the in-

tention of the testator, clearly expressed in his will, be regarded. No one claiming from or through his wife has any right to the balance remaining after her death.'

Such is the conclusion of the argument of appellant's counsel, Messrs. Kell and Wanner, on this point of case stated, and, although not made a question in the case before the Supreme Court, nor passed upon by it, doubtless means that, notwithstanding the words of testator subjecting said balance, even though it might be held, technically, to be testator's own estate, to the payment of his wife's just debts and funeral expenses, no one claiming payment of a just debt of his wife for care and nursing of her through sickness, the price of a stove and fixtures purchased on credit for her comfort, nor even a comparative trifle for her funeral expenses, (e. g. an item of $1.50 paid the minister for performance of the last sad rites of burial) could, or should be claimed or paid out of said balance. And such, though no written brief of argument was furnished by him, the auditor understood to be the position of Mr. Kell at the audit, and from which the auditor feels forced to dissent. His view being that the will gives testator's wife a life estate, such as his will fully describes and limits, with power to consume the whole during her life, with remainder over, if any, but such remainder over to be subject to the payment of her just debts, if any incurred, for her support, (as was the whole, during her natural life,) and for the payment of her funeral expenses.

So far as concerns the notes for nursing and boarding, both of which were confessedly necessary, and the amounts not even seriously contended, much less proved to be excessive, it is plain from the whole evidence on the subject, that the long continued possession of her money by her son Rankin, and his persistent refusal to give it up to her when requested, forced his aged, and stricken and painfully afflicted mother, even in her last illness, to live and be cared for *on credit*. Hence the said notes. As for her funeral expenses, though expressly directed by testator to be paid, *before* distribution of "the balance that is left," she could hardly have been expected to have them estimated and to pay them in advance, especially while Rankin was holding on to, and refusing to give her her money and papers. But he swears he was acting her agent, and as such had her money and papers, paid money for her use, notably the $69 on account of and credited on the now disputed Note No. 2, for board, April 5th, 1895, and nine days before her death. But though there was such agency, it was certainly not irrevocable, and she had a perfect right to call him to account, and even to revoke the agency at any time she pleased.

The third objection to the said notes (1 and 2) is that "No consideration was given by Samuel Gross or any other person for him, or on his account."

As the auditor finds abundant evidence to the contrary, on the face of the notes themselves, besides much really uncontradicted oral evidence, the said objection is overruled.

The fourth objection is, First, "That the execution of said notes was procured by Samuel Gross when Margaret Strominger was wholly incapable of making a valid contract." Second, That "the said notes were concocted by Samuel Gross at the office of R. P. Strominger, at Goldsboro, —— miles away from the residence of Margaret Strominger, when she was not present and not able to be present on account of her paralyzed condition."

Neither branch of this objection is sustained: for, while it is true that Mrs. Strominger was sick in bed, suffering physically from paralysis, at the time Samuel Gross went to R. P. (Reub) Strominger's and had him draw up, or rather fill up the blank forms for the notes, it is a fact apparent from the whole evidence, exclusive of Samuel Gross', who, though objected to by Mr. Kell, as incompetent, was nevertheless, cross-examined very fully by him, and the important fact, among others, brought out, that it was at Mrs. Strominger's own request that he went to R. P. Strominger's and got him to write the notes, and that at the time of said request her mind was "all right." I say the fact is apparent from the evidence, exclusive of Samuel Gross', that Mrs. Strominger was *not* at the time she executed said notes or either of them, "wholly incapable of making a valid contract." On the contrary, the evidence, including the medical testimony shows that although physically and mentally weak *about* that time, she

was *at the time* mentally capable of making a valid contract. Nor is it even alleged that any undue influence was exerted by any one to induce her to request the preparation of said notes, or either of them, the execution thereof. Nor is there any sufficient proof alleged in the second branch of said fourth objection, that "the said notes were concocted by Samuel Gross at the office of R. P. Strominger, * * * in the absence of Margaret Strominger." Neither the testimony of Gross nor Strominger, nor of any other witness, in the opinion of the auditor, proves such a monstrous fraud as is charged. Fraud must be clearly proved, and the greater the fraud charged the clearer the proof of it should be. The said fourth objection is therefore overruled.

The fifth objection is overruled for reasons similar to those given for overruling the first branch of the fourth reason, viz: The absence of sufficient proof that *at the time* of requesting the preparation of said notes, or either of them, or of executing them or either of them, Mrs. Strominger was incapable of making a valid contract by reason of her mental condition.

The substance of contestants' proof is that Mrs. Strominger at times talked sensibly, gave sensible answers, etc., but if left to talk herself, would talk on a different subject; that she said, however, that she was not fit to attend to her business, and would do nothing without consulting her son Rankin, or words to that effect; which tends rather to show mental capacity and discrimination than the contrary. Altogether it indicates at most, about what Dr. Gross so mildly, cautiously, and no doubt, truthfully styled it, "senile—a little childish." Had he said senile *dementia*, or had any other witness been able to recollect or give even substantially, a single word, phrase or act indicating actual mental unsoundness, or inability to comprehend the nature, probable effects and consequences of her acts, such as executing a note, a far different case would have been presented. On the contrary the uncontradicted evidence shows that at the very time, and very recently before executing the notes she spoke of their amounts, her object and purpose, and the considerations, to wit: she wanted to give these notes (No. 1,) to Samuel Gross for his great trouble in taking care of her through sickness, and the other (No. 2,) for her board. All objections to them are therefore overruled, they are admitted in evidence in connection with the oral evidence, and allowed in the distribution, as also the claims for funeral expenses, $14.55, Undertaker Bahn's and Mr. Kunkel's for the price of a stove and fixtures, $14.85. Nor is there any evidence showing that the rates claimed for nursing, and boarding, or either are excessive, unreasonable, or above what is usual in the neighborhood, and so of the small amount claimed for funeral expenses, the stove and fixtures, and last and least of all Dr. R. D. Swiler's claim, 75 cents for medicine furnished, which though not formally proved, is also allowed, not being objected to by either side.

Exceptions were filed to the allowance of the Gross claims.

James Kell for exceptions.
E. W. Spangler for report.

November 15, 1897, STEWART, J.—After a careful examination of this case I see no reason for disturbing the findings of the auditor in his legal conclusions. The exceptions are thefore dismissed and the report confirmed.

COMMON PLEAS.

Blasser's use v. Smith.

Judgment—Lien of— Contribution—Subrogation.

C entered judgment against defendant and thus obtained a lien on two properties owned by him. Subsequently one of those properties was sold to D. Afterwards a second judgment was entered in favor of plaintiff. C's judgment was assigned to plaintiff who levied upon the property sold to D, whereupon D petitioned the Court for an order on the plaintiff to first sell the property of defendant not conveyed to D, or assign C's judgment to D upon payment of the amount due thereon. HELD, that the petition must be granted.

The rule that where one creditor has a lien upon two properties and another creditor has but one, the former must exhaust the fund upon which the latter has no claim is not applicable where the two claims are in the hands of the same person.

The fact that the plaintiff was ignorant of the conveyance to D when he took his second judgment will not avail him in this proceeding.

Rule on plaintiff to show cause why he should not levy upon and make sale of other real estate of said defendant before levying upon that in possession of petitioner or assign the judgment to him upon payment of the amount due thereon.

Chas A. Hawkins for petition.
N. M. Wanner, contra.

January 3, 1898. BITTENGER, P. J.—Emanuel S. Smith, the defendant in the above judgment, was the owner of the two tracts of land or lots of ground described in the petition of the petitioner, Curwin H Howard, at the time of the entry of the judgment No. 846 January Term, 1895, entered March 27, 1895, in favor of the Spring Garden Building and Loan Association, No. 1. On the 24th day of December, 1895, said Emanuel S. Smith and wife granted and conveyed the City property of said Emanuel S. Smith to the petitioner, Curwin H. Howard, his heirs and assigns. Afterwards several other judgments against said Emanuel S. Smith, among them one in favor of Jared F. Blasser, were entered, the latter having been entered on the 6th day of April, 1896, to No 1560 January Term, 1896, for $1000.00.

On September 20, 1897, said Emanuel S. Smith and wife executed and delivered to Jared F. Blasser a deed of assignment for the benefit of the creditors of the said Emanuel S. Smith; and on September 21st, 1897, the Building Association assigned to said Jared F Blasser the said judgment, the balance due thereon being $1087 98.

The said Jared F. Blasser obtained an order of Court to sell the Spring Garden property lately owned by Emanuel S. Smith for the payments of debts, and has, by virtue of a fi. fa. on said judgment so assigned to him by said Building Association caused to be levied by the Sheriff of York county, the property in the City of York conveyed by said Emanuel S. Smith by deed dated December 24th, 1895, to the petitioner.

The petitioner now invokes the protection of the Act of April 22nd, 1856, P. & L. Dig. page 2492, pl. 55, which is as follows:

"Whensoever the real estate of several persons shall be subject to the lien of any judgments to which they should by law or equity contribute, or to which one should have subrogation against another or others, it shall be lawful for any one having right to have contribution or subrogation, in case of payment, upon suggestion by affidavit and proof of the facts necessary to establish such right, to obtain a rule on plaintiff, to show cause why he should not levy upon and make sale of the real estate liable to execution for the payment of said judgment, in the proportion or in the succession to which the properties of the several owners shall in law or equity be liable to contribute towards the discharge of the common encumberance, otherwise upon the payment of such judgment to assign the same for such uses as the court may direct; and the court shall have power to direct to what uses the said judgment shall be assigned, and when assigned, direct all executions thereupon, so as to subserve the rights and equities of all parties whose real estate shall be liable thereto; and if the plaintiff shall refuse to accept his debt and make such assignment of his judgment, the executions thereupon in the hands of the plaintiff shall be so controlled and directed by the court as to subserve said rights and equities."

Jared F. Blasser, by his counsel, contends that this Act does not apply, for the reason that when he entered his second judgment above mentioned, he was ignorant of the conveyance before that date, by Emanuel S. Smith and wife of the city property to the petitioner, and that the equitable doctrine which requires where one creditor has a lien upon two properties or may resort to two funds for payment, and another creditor has but one, the former must exhaust the fund upon which the latter has no claim. This is a familiar principle and is clearly recognized in Loyd v. Galbreath, 32 Pa. 103, and Kindig v. Landis, 135 Pa. 612.

This principle might be applicable if the Spring Garden Building Association, the original holder of the judgment upon which the execution which the petitioner asks to have arrested was issued, were the plaintiff in the execution. It might then be the privilege of Mr. Blasser to invoke this equity. Even this is doubtful, for the rule does not prevail except where the funds are in the hands of the common debtor of both creditors; Loyd v. Galbreath, *supra*. But as the respondent holds the judgment in question and is plaintiff in the execution he cannot in-

voke the equity in his favor. This case comes within the exception noted in Kindig v. Landis, *supra*, "where some equity renders the application of the rule unjust."

It was the privilege and duty of the respondent before he took his second judgment to learn whether or not the defendant in the judgment, Emanuel S. Smith, still owned both the properties in question. His not doing so was his own neglect. He is not a purchaser for value, and has no lien upon the property of the petitioner, by virtue of his judgment entered after the conveyance of the city property by Emanuel S. Smith and wife to the petitioner.

If he took the judgment to secure a previous indebtedness he has lost nothing by the conveyance. If he loaned to Smith the moneys mentioned in the judgment, believing his judgment would be a lien on the city property, he has lost like any lender who should make loans and take judgments without proper inquiry and investigation.

The provisions of the Act of May 22, 1856, herein quoted, are explicit and in our opinion aptly apply to this application.

It is ordered that the said Jared F. Blasser first proceed to dispose of the Spring Garden property described in the petition, and apply the net proceeds to the payment of his judgment No. 846 January Term, 1895, otherwise that he assign the said judgment for the balance due on the same, to the petitioner, upon payment by him of the balance due on said judgment, with interest, attorney's commissions and costs; and we order that execution be stayed upon the said Fi. Fa. No. 14 January Term, 1898, until this order be complied with.

Reist v. Reist.

Affidavit of defence—Making of—Limitation.

Suit having been brought by an administrator, it is no ground for judgment for want of a sufficient affidavit of defence that the affidavit was made by the defendant.

The affidavit of defence set forth that the moneys mentioned in the notes and drafts were expended in the partnership business, a full settlement of which was made and all the interest of the defendant surrendered to plaintiff's intestate, who retained possession of the notes and papers; also, that the notes and drafts were due more than six years prior to the bringing of the suit and death of plaintiff's intestate and are therefore barred by the statute of limitations; and that for two years and a half before his death, testator had not been *non compos mentis* to such an extent as to render him incapable of bringing suit. HELD, to be sufficient to prevent judgment.

Rule for judgment for want of a sufficient affidavit of defence.

A. C. Reinoehl and *Niles & Neff* for motion.

D. K. Trimmer, contra.

January 3, 1898. BITTENGER, P. J.—The plaintiff asks for judgment; first, because the plaintiff's intestate being deceased, the defendant is not a competent witness in his own behalf, and second, because the affidavit of defence does not disclose a valid defence to the action.

No case has been cited to the effect that a party defendant who is incompetent to testify in his own behalf, cannot make a valid affidavit of defence.

In the absence of authoritative decisions, we cannot for a moment, entertain this surprising and unreasonable proposition. If this should be held as contended, there would be no manner of escape from summary judgment by a defendant whose defence, (as is usually the case,) is within his own knowledge. This, the law is not so unreasonable and unjust as to inflict upon defendants in actions brought by legal representatives of deceased parties to a contract.

In this case the defence set out is that the moneys mentioned in the notes and draft upon which suit is brought, were used and expended as partnership funds in a partnership business in which the plaintiff's decedent and the defendant were partners, in a business carried on in the City of Lancaster; that said partnership was ended in 1890; and between the spring of that year and the 20th of September following, a full, final and complete settlement was made between the partners of all matters relating to said copartnership and all the interest of the said defendant in the business assets and liabilities of said co partnership surrendered and turned over to the said C. H. Reist, now deceased; that in the final settlement, all the monies that had been realized from or were represented by the said notes and draft upon which the suit was brought, were taken into account, adjusted and satisfied; though said papers remained in possession of the said C. H.

Reist, plaintiff's intestate; that the notes and drafts having been due for more than six years prior to the bringing of the suit and death of C. H. Reist, they are barred by the statute of limitation and that C. H. Reist for two years and a half before his death had not been *non compos mentis* to such an extent as to render him incapable of bringing suit, as alleged in plaintiff's statement.

An affidavit of defence should state the facts specifically, with sufficient detail to enable the court to say whether or not they amount to a defence; Superior Nat. Bank v. Stadelman, 153 Pa. 634.

Upon a rule for judgment for want of a sufficient affidavit of defence, the statements of the affidavit are to be taken as absolutely true; judgment must be refused where the averments of the affidavit are a positive denial of the plaintiff's claim or show facts which *prima facie* amounts to a defence; Bryson v. Home for Disabled and Indigent Soldiers, 168 Pa. 352; Reformed Dutch Church v. Jones, 132 Pa. 462.

We regard the affidavit sufficient under these authorities. It sets out the fact of payment of the notes and draft in suit, with all the particularity required in Hiestand v. Williamson, 128 Pa. 122; and specifically avers that the plaintiff's intestate for two years and a half previous to his death, when suit might have been brought, prior to the running of the statute of limitations, was not *non compos mentis* to such an extent as to prevent him from bringing suit.

The particular averments of the partnership transaction between plaintiff's intestate and the defendant, to use the monies mentioned in the statement in said co-partnership, and the payment of the securities in suit in a settlement of the partnership, and the turning over of the assets and liabilities to C. H. Reist, are themselves a sufficient defence in this action, to prevent judgment.

Therefore the rule must be discharged. The rule is discharged

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Corporations— Right of Eminent Domain.—Where the interference by one corporation with the property of another can be readily compensated in damages and the whole property made to serve the purposes of both, and the uses of the property by each corporation can stand together, the right to take will be recognized if the necessity for such taking exists.—*The Scranton Gas and Water Co. v. The Northern Coal and Iron Co.*, (Lackawanna C. P.) 3 Lackawanna Legal News 302.

Electric Railway Company—Local Authorities.—The consent of all the local authorities through whose districts the established route of an electric passenger railway passes, must be obtained before any part of the road can be built.—*The Reading Company v. Passenger Railway Companies*, (Montgomery C. P.) 14 Montgomery County Law Reporter 10.

Life Insurance—Health—Interest.— In an action on a life insurance policy, where the defense is that the plaintiff was not in sound health at the time of the issuance of the policy, if the testimony is conflicting, the question is properly submitted to the jury with instructions that "if the defendant has satisfied you at the time Adam Neal was insured he was not in sound health, then the plaintiff could not recover, because that is part of the policy, part of the agreement and understanding —that is the issue." In such a case a niece of the insured, who has been raised in his family and treated as a member, and who, after her marriage, lives next door to him, is a person who has an insurable interest in his life.—*McGraw v. Metropolitan Insurance Company*, (Superior Court) 28 Pittsburg Legal Journal 170.

Water—Drainage—Boroughs.—A borough has a right to make a sewer empty its drainage into a natural stream even though the effect of this is to increase the flowage; and it may also permit private citizens to dig up the street and lay a drain-pipe into it for the purpose of carrying off the surplus water from their buildings. If a property owner in a borough constructs a wall across a natural water-course, the flow of which has not been increased by any act of the borough or other citizens, and the wall obstructs the flow of the water, the borough may remove the wall.—*Flinn v. Borough of Shenandoah et al.*, (Schuylkill C. P.) 3 Lackawanna Legal News 280.

York Legal Record.

Vol. XI. FEBRUARY, 1898. No. 8.

COMMON PLEAS.

Hartman v. Mitzel.

Attachment—Wages—Compensation.

Garnishee in an attachment execution admitted having in his hands funds belonging to the defendant, due him for services in subpoenaing witnesses. HELD, on demurrer, that these funds were not liable to attachment.

Though the defendant was receiving neither wages nor salary, since the amount was not fixed in advance, yet he was awarded compensation for his services, which falls within the proviso of the Act of April 5, 1845, P. L. 459, as much as commissions on sales by a travelling sales agent.

Demurrer to Garnishee's answer.

The answer filed by the Garnishee was as follows:

My answer to the first interrogatory is: That I know the defendant and have know him for a number of years.

My answer to the second interrogatory is as follows: About three years ago William F. Sechrist, a resident of Frederick county, Maryland, administered on the estate of his father, Frances Sechrist, late of Hopewell Township, York County, Pa., deceased, and employed me as his attorney in the same. About two years ago the sureties of said administrator on the bond of the personal estate, as well as for the sale of the real estate of the deceased, desired to be relieved from their obligations on said bonds on accounted of certain rumors promulgated as to the insolvency of the administrator; it was then agreed between said sureties and administrator that they would continue as sureties on condition that all the moneys that would thereafter be realized on the sale of the personal or real estate should be paid to me, as attorney for the said administrator, and be disbursed by me to the parties entitled to receive the same, with the same effect as if the money had been paid to said administrator. That in pursuance to said agreement the said moneys that were thereafter collected in said estate were paid to me, and at the time of the service of said attachment upon me, I had in my hands the sum of about $3500.00 belonging to said estate and the said administrator had in his hands the sum of about $500 belonging to said estate.

That said administrator filed his account in the Register's office, charging himself with all the moneys received by me, as well as by him, belonging to the said decedent's estate, which said account showed a balance of $4476.96.

That upon the confirmation of the said account, an Auditor was appointed to make distribution of the balance on said account. That thereupon Latimer, Chapin & Schmidt presented a note of $3600 dated April 2, 1892, with interest, payable to Jane Sechrist and alleged to have been signed by the decedent, Frances Secrist. The payment of this note was strenuously resisted on the ground that the signature of Frances Sechrist was a forgery. A large number of meetings were held and a large amount of testimony taken for and against the genuineness of the signature of Frances Secrist. After a fierce and protracted struggle the Auditor decided that the signature of Frances Secrist to said note was a forgery.

When the note was first presented to the Auditor it became necessary to secure witnesses and testimony to contest said note, and as the administrator was a resident of Frederick County, Maryland, the defendant, P. A. Mitzel, was employed to hunt up witnesses and gather up testimony to defeat the recovery of said note. That the said P. A. Mitzel was directed from time to time to look up witnesses and testimony and subpoena witnesses in that behalf, all of which he did. That for the services so rendered he presented a bill to the Auditor of over $200. That the same being deemed excessive, a compromise was finally made on the basis of $100 for the services so rendered, and which sum was allowed and awarded to him by the Auditor.

The answer to the third interrogatory is the same as the answer aforesaid to the second.

The answer to the fourth interrogatory is as follows: The defendant did claim the $100 mentioned in answer to the second interrogatory, and there is no debt or demand or suit between us or was at the time of the service of said writ, other than what is stated in answer to the second interrogatory.

My answer to the Fifth interrogatory is the same as my answer to the second interrogatory; and also that I have no

goods, merchandise, property, estate or effects whatsoever, real or personal, belonging to the said defendant, or in which the said defendant is in any way interested, except as stated in interrogatory No. 2.

My answer to the sixth interrogatory is as follows: I have received no letters from the defendant, or from anyone, wherein it was alleged, represented or stated that at the time the writ in the above case was served upon me, or at any time since, the said defendant had not claimed or demanded against me whatsoever; but since the service of said writ, the said defendant verbally notified me not to pay said $100 awarded as aforesaid by the Auditor, to any one but himself for the reason that said $100 awarded as aforesaid, was for wages in discovering testimony and subpoenaing witnesses as stated in answer to the second interrogatory; and being for wages, the same is not attachable under the law; and he also informed me that notice had been given to the Sheriff in this attachment to that effect; and for the further reason that the money collected by me was the money of the administrator, who was not served in this attachment, nor legally made a garnishee, as the record in this suit discloses.

My answer to the seventh interrogatory is the same as that to the second interrogatory, and the further answers to the subsequent interrogatories; and further that I did not have at the time of the service of said writ upon me, any money in my hands, (if the same was legally in my hands,) possession, custody or control belonging to the estate of said Frances Secrist, deceased, to which the defendant was in any manner entitled, under the Auditor's report in said estate or other wise, other than as stated aforesaid.

To which plaintiff filed the following demurrer:

And now, November 29th, 1897, the said plaintiff, by Niles & Neff, his attorneys, demurs to the answer of E. W. Spangler, Esq., one of the garnishees, filed in the above case to the interrogatories served on him at the instance of the plaintiff, not confessing or acknowledging all or any of the matters and things in the answer to be true, and assigns the following causes of demurrer:

1st. Said answer shows no legal ground to prevent judgment being entered by the Court against said garnishee.

2nd. That the services alleged to have been performed by the defendant as stated in said answer, are not such as are protected by the wages Act.

3rd. That the garnishee cannot set up in his answer any matters which are simply a personal privilege of the defendant.

4th. That said answer is in other respects uncertain, informal and insufficient.

Niles & Neff for demurrer.

E. W. Spangler, contra.

January 10th, 1898. STEWART, J.—The plaintiff attached in the hands of E. W. Spangler, Esq, counsel for William F. Sechrist, administrator of the estate of Francis Sechrist, a sum of money awarded by the auditor distributing the balance on the account of said administrator to P. M. Mitzel.

The Garnishee's answer admits that $100, the amount awarded to said P. M. Mitzel, was in his hands at the time of the service of the writ upon him, and avers that it is exempt from attachment as being wages or salary of the defendant. The facts upon which this exemption is predicated are these: In the course of the distribution before the Auditor, a note for $3600 was presented against Francis Sechrist and objected to upon the ground that the signature thereto was a forgery. The administrator lived in Maryland, while the decedent lived and died in this county. The answers avers that Mitzel "was employed to hunt up witnesses and gather up testimony to defeat a recovery on said note; that he was directed from time to time to look up witnesses and testimony and subpoena witnesses in that behalf, all of which he did; that for the services so rendered he presented a bill to the Auditor of over $200. That the same being deemed excessive, a compromise was finally made on the basis of $100 for the services so rendered, and which sum was allowed and awarded to him by the Auditor."

These are the allegations of the answer and are of course admitted by the demurrer. Are the facts so stated sufficient to show that the money in the hands of the Garnishee is not subject to attachment?

The proviso to the 5th Sec. of the Act

of April 15, 1845, P. L. 459, is as follows: Provided however "that the wages of any laborers or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer." The answer alleges and the demurrer admits that Mitzel was employed to render this service and that $100 was awarded to him for these services. The situation I admit, is anomalous; he was neither working for wages strictly speaking, nor for salary, since the answer does not allege that either was fixed in advance. Compensation is what he was awarded for his services, but this I think falls within the proviso of the Act as much as commissions on sales by a travelling sales agent and these were held exempt in Hamberger v. Marcus, 157 Pa. 133, where the whole question was recently elaborately discussed and decided.

I am of opinion that the compensation so earned is exempt from attachment and the demurrer is therefore over-ruled and judgment is entered for the Garnishee on his answer.

Boll v. Boll, No. 3.

Judgment—Collateral—Advances on..

A sold real estate to B and took a judgment note for the purchase money, which note was assigned to C and subsequently to D, the use plaintiff, on which A borrowed $3100. Subsequently he borrowed more money from D, and executed an agreement with the declaration that the assignment was made to cover loans then made and all future loans. B reconveyed the greater part of the real estate to A. After this E entered judgment against A for $17,000, being prior to some loans made to A by D. The evidence showed that B had notice of the assignment to D, while D had no knowledge of the reconveyance to A. The property was sold at Sheriff's sale, and before the Auditor distributing the proceeds E contended that D's loans made after the entry of E's judgment should be postponed to said judgment. The Auditor found against E. On exceptions filed to his report, HELD, that the exceptions must be dismissed.

E further contended that the reconveyance to A was a satisfaction of the judgment, and excepted to the Auditor'r report finding against him HELD, that the exception must be dismissed.

The placing of the assignment of the judgment to D on record vested the title thereto in him, so that it could not be divested except by his own act or payment. The judgment being given for a full legal consideration, no part of which has been paid, and the assignment being to secure all loans made and to be made, there is no reason why it should not have that effect.

Without any inquiry by or notice to E as to the amount due on the judgment, he was bound to assume that the full amount was unpaid and would take precedence in any distribution of the proceeds of the property.

Exceptions to Auditor's report.

The facts are set forth in the Court's opinion.

Cochran & Williams for exceptions.

Niles & Neff and *R. F. Gibson*, contra.

January 10th, 1898. STEWART, J.—Prior to March 7th, 1891, Henry Boll, the plaintiff, in judgment No. 526 April Term, 1891, was the owner of certain real estate in this City, situate in the 8th Ward. On that day he sold this real estate to C. Roman Boll, his son, taking from him a judgment note for $3500 in payment of the purchase money, and on June 23, 1891, he entered judgment on this note to the above number and term, and the same day assigned the judgment to Smyser, Bott & Co., Bankers.

On September 19th, 1893, Smyser, Bott & Co, at the request of Henry Boll, assigned this judgment to the Columbian Building and Loan Association, the use plaintiff in this proceeding, and received payment of Boll's indebtedness from them, and on the same day Henry Boll borrowed from said Association $3100 on thirty-one shares of stock for which he gave no other security. After that he borrowed from the said Association on stock held by him as follows:

On Aug. 1, 1894, on two shares of stock	$200
On Jany. 23, 1895, on ten shares of stock	1000
On Oct. 30, 1895, on seven shares of stock	700

Henry Boll had in all fifty shares of stock in the Association on all of which he borrowed money to the amount of $100 per share. For the first thirty-one shares borrowed by him he gave no security, other than the bond against C. Roman Boll, as above stated. When he borrowed on the two shares of stock he assigned his remaining 19 as collateral. When he borrowed the 10 shares he executed two judgment bonds, one for $200 and one for $800. neither of which was entered

And when he borrowed on the 7 shares he gave no new security. But on January 24, 1895, the day after borrowing the $1000 he executed an agreement, with a declaration to the Association in which he declared that this $3500 judgment of

Henry Boll v. C. Roman Boll "is held by the Association as collateral security for all of the thirty-three shares of the first series of the capital stock of said Association, and all of the ten shares of the second series of said stock loaned to said Henry Boll." It will be observed that the loan of seven hundred dollars was made after the date of the above declaration, namely, on October 30, 1895. At the hearing however, before the Auditor, Henry Boll testified that the assignment of the judgment to the Association was not only to cover the loan then made to him, but all future loans.

At the time of making the loan of $1,000, on January 24, 1895, Henry Boll executed two judgment bonds as above stated. One of the terms of these bonds reads as follows: "And further, I, the above named Henry Boll do hereby expressly agree that all money heretofore paid or hereafter to be paid by me into the said Association on the stock I now hold in the same, shall be taken and considered as payments on and in liquidation of this bond."

This completes the history of the loans.

C. Roman Boll received his deed above referred to on March 7, 1891; on the 12th of the same month he entered it for record. On March 31, 1894, he reconveyed the greater portion of this lot to Henry Boll by deed of that date, which was entered for record January 9th, 1896. At the time of this reconveyance the whole lot was still subject to the lien of judgment No. 526, April Term, 1891, for $3500 On October 31, 1895, the Columbian Building and Loan Association released the portion of the lot retained by C. Roman Boll from the lien of said judgment. In the meantime however, on August 29, 1894, the Mechanics and Workingmens' Building and Loan Association entered a judgment against Henry Boll for $17,000. This was after C. Roman Boll reconveyed a portion of the lot to Henry Boll, which occurred March 31, 1894, and before the loans of $1000, January 24, 1895, and $700 on October 31, 1895, and before the release by the Columbian Association of the portion of the lot retained by C. Roman Boll from the lien of their collateral judgment which occurred October 31, 1895.

The Auditor finds as facts that C. Roman Boll had notice of the assignment of the $3500 judgment against him to the Columbian Association; that said Association had no notice of the reconveyance to Henry Boll until after it made its last loan to him, which findings are fully sustained by the evidence.

The Mechanics and Workingmens' Building and Loan Association contends that the Columbian Association should be postponed in this distribution on the loans made after the entry of their jungment, in other words that the Columbian Association's judgment is good only to the amount it had loaned on the security of it, at the time of the entry of their judgment, and also that the reconveyance by C. Roman Boll to Henry Boll was in satisfaction of the $3500 purchase money judgment.

The Bolls did not exactly so understand the transaction. By the reconveyance of the property they both understood that C. Roman Boll was relieved from any further liability on it and that the payment of the judgment was assumed by Henry Boll. This fully appears from the testimony of both. But this was not the legal effect. C. Roman Boll remained liable to the use plaintiff as before and Henry Boll became liable as terre tenant of the land bound by the lien of judgment. C. Roman Boll was Clerk in the Prothonotary's Office in which the judgment was entered, and actually made the entry of the assignment from Smyser, Bott & Co. to the Columbian Association. He was bound by that knowledge to know that his father was no longer the holder of the judgment against him, and also that a reconveyance of the property to him would not satisfy the judgment; Gutheir v. Bashline, 25 Pa. 80; Tritt's Admr. v. Calwell's, 31 Pa. 228.

The Columbian Association took the judgment as collateral and put their assignment on record. This vested the title thereto in them, so that it could not be divested except by their own act or payment; Campbell's Appeal, 29 Pa. 401; Fisher v. Knox, 13 Pa. 622. So there can be no question but that the judgment remained in full force a lien against the property and was not satisfied by the reconveyance.

The other contention of the Mechanics and Workingmen's Association, namely, that the judgment is good only for the amount loaned upon it as collateral at the

time of the entry of their judgment seems equally fallacious. The judgment itself, as given and understood by the parties, was for a full legal consideration: the purchase money of real estate. It is not asserted that the consideration has in any wise failed, or that any portion of it has been paid except by the reconveyance, which, as has been shown, was a mispayment, if intended to be payment at all. It has also been shown that the assign ment of it as collateral was to secure all loans made and to be made. Why should it not have this efiect? It is likened to a judgment or mortgage given by a borrower to secure money loaned and future advances, as in Kerr's Appeal, 92 Pa. 236, and kindred cases. But there is certainly a wide difference in principle. In the case in hand a full consideration for the whole amount of the judgment passed between the original parties to it. while in the other case, as between the original parties the obligation is good only to the extent that the consideration has been paid, or at most agreed to be paid, and hence a junior judgment creditor's rights attaches ag against future advances. Even this would not be so, however, in this case, in view of the testimony of Henry Boll, who says the assignment was made to secure future advances. An unrecorded agreement to make future advances was held to be not only a valuable consideration for a mortgage, but such as to entitle the mortgagee to a preference over liens attaching before the advances were actually made; Moroney's Appeal, 24 Pa. 372; Taylor v. Cornelius, 60 Pa. 187-95. As the record stood the Columbian Association had a lien against the land reconveyed to Boll at the time the Mechanics and Workingmen's Associaiion entered their judgment, and of this fact they were bound to take notice. It was a judgment not against him, but against C. Roman Boll, and a lien on the land which he offered them as security, and without inquiry by or notice to them as to the amount due thereon, and none has been shown, they were bound to assume that the full amount of the judgment was unpaid and would take precedence in any distribution of the proceeds of the property.

In view of these conclusions I am of opinion that the exceptions to the Auditor's report should be dismissed and the report confirmed, and it is accordingly so ordered.

Wolf v. Fortney et al. No. 2.

Administrator—Surety of—Laches.

An administrator, whose account had been audited and the report finally confirmed, placed all the money awarded by the Auditor's report in the hands of C and notified the parties, including A, the use plaintiff, to call there and get their money. C testified that he received the money, that A called at his office twice and was offered the money but refused to take it, alleging error in the amount; that the money remained in his hands about a year and was then repaid to B, the administrator. Plaintiff brought suit on the administration bond, the administrator being insolvent. On the trial she denied the facts testified to by C, who was corroborated by his partner, while in some matters plaintiff was corroborated by her neighbor. The jury found for the plaintiff. On a motion for a new trial, HELD, that the question of the tender and refusal of the money depended upon the credibility of the witness and this being purely a question for the jury, the Court would not set aside the verdict on the ground of its being against the weight of the evidence, although the Court might have reached a different conclusion upon the same testimony.

The notice given to the plaintiff not urging her to diligence in getting her money but rather tending to lull her into security, the sureties were not discharged because the plaintiff failed for a year to go after the money.

Motion for a new trial.

The Courts's opinion gives the facts. See also, Wolf v. Fortney et al., 10 YORK LEGAL RECORD 149, on the sufficiency of the affidavit of defence in this case.

John N. Logan for motion.

H. H. McClune, contra.

January 10, 1898. STEWART, J.—Andrew D. Fortney was the administrator of the estate of Jacob Fortney, deceased. In August 1887, an order to sell the real estate of his intestate was granted to him, the other two defendants becoming his sureties on his bond filed in the Orphans' Court, upon which order he sold the real estate, filed his account which was audited and the sum of $38. awarded to Annie Mary Wolf, the use plaintiff who was a daughter of Jacob Fortney. This report was filed Dec. 13th, 1888, and no exceptions were filed thereto, so that on the 4th of January, 1889, it was finally confirmed under the rule of Court. This share awarded to the use plaintiff has not been paid, and the administrator, Andrew D. Fortney is insolvent, and makes no defence to this suit. Jonathan and John Williams however, claim to be discharged

as sureties by the conduct of the plaintiff in refusing to accept her money. At the trial they proved that Andrew D. Fortney placed all the money awarded by the Auditor's report in the hands of D. W. Beitzel, Esq., then an acting Justice of the Peace at Dillsburg, Pa., and notified the parties entitled thereto, to call and execute a release and get their money. The plaintiff lived at Middletown, Dauphin county, Pa., and Andrew D. Fortney, administrator at or near Uno P. O., York County, Pa. The notice sent to the plaintiff was as follows:

"Uno P. O., York Co., June 22, 1889.
Mary you can get your money at Squire Beitzels office at Dillsburg,
Pa., any time you call for it."

The defendants called D. W. Beitzel, who testified that in the Spring of 1889 Andrew D. Fortney placed the money and release in his hands with instructions to pay it out; that the plaintiff called at his office at Dillsburg on two occasions and each time he offered her the amount awarded to her and urged her to take it and execute the release, but that she refused stating there were errors in the account and that she would see further about it; that the money remained in his hands about a year and that Andrew D. Fortney then came and got it. He is corroborated by Michael Bender his partner, as to one of the offers made to her.

The plaintiff flatly denies that the money was ever been tendered to her or that she had been at Dillsburg during 1889; that she was not there from the fall of 1888 until the Spring of 1892; that she had been ill during that time, so ill as not to be able to leave her home; that she went to Dillsburg in the Spring of 1892 for her money and was informed that it had been returned to the administrator. As to her inability to leave home during the period mentioned or rather from 1888 until the Spring or Summer of 1891 she is corroborated by Mrs. Maggie Fortney, her next door neighbor.

There was a direct issue between the plaintiff and defendants as to whether the money was tendered or payment offered to the plaintiff and refused by her. The defendants were supported by Beitzel and Bender and the plaintiff by Mrs. Fortney and her own denial. This issue of fact I submitted to the jury and they have found for the plaintiff. I am urged to set aside their verdict because it is against the weight of the evidence. The truth to be ascertained depends here entirely upon the credibility of the witnesses and that is peculiarly within the province of the jury.

There is sufficient evidence to support their finding if they believed the plaintiff and her witness, and this being so their verdict ought not be disturbed, whether the court would have found the same way on the same testimony or not; Anstine v. Mayer, 4 YORK LEGAL RECORD 21.

At the trial I reserved the following point, stated on the notes at the conclusion of the charge; "It appears from the uncontradicted evidence that Mr. Beitzels office, the gentlemen with whom the money was left, is at Dillsburg, Pa, and that the plaintiff at the time the money was left in his custody or possession resided at Middletown, Dauphin County, Pa.; that on June 22, 1889 Andrew D. Fortney wrote a letter dated at Uno P. O., York County, Pa., June 22, 1889 reading as follows: "Mary," meaning the plaintiff, Mrs. Wolf, "you can get your money at Squire Beitzel's at Dillsburg any time you call for it;" that the plaintiff received that letter and that the money deposited by Andrew D. Fortney with Beitzel to pay the plaintiff with others remained in his hands from the Spring of 1889 until the Spring of 1891 for a period of about one year, and that the plaintiff did not according to her testimony, call for the money within that period. The legal proposition as to whether or not this discharged the sureties as a matter of law I reserve for future decision."

I was inclined to think under the rulings, that where a creditor has the means of payment in his control and does not avail himself of it, the sureties of his debtor will be discharged as in the cases cited and referred to in Hutchinson v. Woodwell, 107 Pa. 509, and I am still of opinion that had the Administrator placed the money with Beitzel and given the plaintiff notice to call and get her money and she had failed for a year to do so the sureties would be discharged. But the notice given was "Mary you can get your money at Beitzel's at Dillsburg any time you call for it. "Any time" did not mean within any specified time, within a year, but generally any time. The

only inference from this language is that she could get her money whenever she called for it, whether a long or a short, a reasonable or unreasonable time. The effect was not to urge her to diligence in securing her money but to lull her into security. Such being the case I am of opinion that the authorities referred to do not control the case.

The verdict was rendered March 12, 1897 and the motion for judgment *non obslante veredicto* on the reserved point was not made until April 5th, when a rule was granted to show cause.

The practice is to file the motion within four days after the rendition of the verdict, but this is regulated generally by rules of Court. We have, I find, no rule on the subject, which is an oversight. So as to give the defendants the benefit of such motion, it is now ordered that the motion be treated as if filed in time or as made and filed April 5th, 1897 as of March 15th, 1897, within the four days.

In view of these reasons the rule for new trial is discharged and the motion for judgment non obstante is over ruled and judgment is directed to be entered on the verdict upon payment of the jury fee.

Borough of Hanover v. O'Bold.

Summary conviction—Borough ordinances—Justice's transcript.

Defendant was summarily convicted of violating a borough ordinance relating to cess pools. The Justice's record failed to set forth the ordinance or the substance of it. HELD, to be a fatal defect.

Certiorari.

The Justice's transcript is as follows:

York County, ss.

Before me, the subscriber, one of the Justices of the Peace in and for said county, personally came Charles Kurtz, Health Officer of the Borough of Hanover, in said county, who, upon his solemn oath, according to law, saith that on or about the 21st day of August, 1897, at the Borough of Hanover, in the county aforesaid, one Vincent O'Bold did have and maintain upon his premises, to wit: "Hotel O'Bold," a certain cess pool or privy vault, into which is drained water closet and privy matter; that said cess pool or privy vault is not water proof, and at present overflows, and has previously overflown, upon alleys and gutters of the Borough of Hanover, contrary to an ordinance of said borough in such cases made and provided.

(Signed) CHARLES KURTZ,
Health Officer.

Sworn and subscribed to before me this 21st day of August, 1897.

BARTON H. KNODE, J. P.

August 21, 1897, warrant issued and placed in hands of H. A. McKinney, Constable.

August 21, 1897, defendant brought up, and held in $200 bail for a hearing before me at one o'clock p. m., on August 28, 1897.

August 28, 1897, one o'clock p. m., in my office, in Hanover, Pa., said county, the said Vincent O'Bold appears, with L. D. Sell, Esq., as agent, to answer the matter of complaint contained in the above information. Whereupon, I, the said Justice, proceeded to examine into the truth of the said complaint contained in said information in the presence and hearing of the said Charles Kurtz, Health Officer, the complainant, and of the said Vincent O'Bold; thereupon, on the day and year last mentioned, and hour aforesaid, at my office in Hanover, Pa., the said Charles Kurtz, with C. E Ehrehart, Attorney for the Board of Health, and C. E. Ehrehart, D. D. Bixler, J. H. Schriver, Henry Sprenkle, H. J. Myers, Wesley Hahn and William Boadenhamer, as witnesses to prove the charges contained in said information against the said Vincent O'Bold, and who were by me duly sworn according to law upon the matter contained in said information, the said witnesses testifying that the said Vincent O'Bold did have and maintain upon his premises, to wit: "Hotel O'Bold," a certain cess pool or privy vault into which is drained water closet and privy matter; and that said cess pool is not water tight according to Section 16, page 52 of the Borough Ordinances of Hanover Borough, and that said matter overflowed into the public alley between the properties of D. D. Bixler and J. H. Schriver, and thence down the gutter on the east side of Baltimore street at the time of the above information. And the said Vincent O'Bold, with his witnesses, John Walter and N. B. Carver, being duly sworn, according to law, testified that the said cess pool was pumped out within the past two weeks; that defendant did all he could to prevent the dis-

charge of offensive matter; that witnesses did not see the discharge, and were not annoyed by unpleasant odors therefrom.

Wherefore, it appears to me, the said Justice, that the said Vincent O'Bold is guilty of the premises charged against him by the above information, and it is therefore adjudged by me, the said Justice, that the said Vincent O'Bold, according to the form of the above named borough ordinance, be convicted, and he is, accordingly convicted, of the offence charged against him by the said information; and I do hereby adjudge that the said Vincent O'Bold, for the said offence, has forfeited the sum of three dollars. according to Section 49, page 58 of said ordinance, together with all legal costs, the said sum to be distributed according to the borough ordinances aforesaid.

In witness whereof I, the said Justice, to this present record of conviction have set my hand and seal, at my office, in Hanover Borough, said county, this 28th day of August, 1897.

BARTON H. KNODE, J. P. [seal.]

The following exceptions were filed:

1st. The record does not show that the Justice had jurisdiction of the subject matter of the suit.

2nd. The record does not show that the offence was committed within the Borough of Hanover

3rd. The proceedings having been improperly begun, the Justice did not acquire jurisdiction of the person of the defendant.

4th. The record does not show what were the provisions of the ordinances alleged to have been violated.

5th. The record does not show that the Justice had authority to impose the penalty imposed upon defendant.

6th. The record does not show that the ordinance was passed prior to the alleged offence committed by the defendant.

The right to file other exceptions is reserved.

Niles & Neff for exceptions.

January 10th, 1898. STEWART. J.—This was a summary conviction for the violation of an alleged Borough Ordinance under which the defendant was adjudged to have forfeited a penalty of $3 for the offence. The record does not contain the ordinance nor the substance of it. It is not in evidence and not before the Court. Manifestly without it the record is not self-sustaining, and the Court can not say whether the ordinance has been violated or not This is essential, and the question is raised by the defendant's fourth exception. Without considering the other exceptions, this one is sufficient to reverse.

The fourth exception is sustained and the proceedings set aside.

C. P. of Philadelphia Co.

Applicatioa of the First Church of Christ Scientists.

Corporations—Charter—No Public Control of Rights of Conscience.

Where the purpose of a corporation is only to inculcate a creed or to promulgate a form of worship, no question can arise as to the propriety of such purpose, because, under the constitution of Pennsylvania, private belief is beyond public control, and there can be no interference with the rights of conscience.

Where the purpose of a proposed corporation, as set forth in the application, necessarily imports a system for the treatment of disease, to be carried into effect by persons trained for the purpose, who may receive compensation for their services, and where the knowledge and training of such healers do not conform to the tests required by law, the courts will refuse to confirm such charter for a church or religious body.

A treatment of disease to be carried into effect by persons trained for the purpose, who may receive compensation for their services, will not be sanctioned by a corporate charter when such method or treatment does not conform to the requirements of the Act of March 24, 1877.

Application for charter.

D. S. Robinson for application.

December 6th, 1897. PENNYPACKER, P. J.—The report of the learned master to whom the above application was referred presents the facts with so much care and clearness that the court is relieved from the greater part of the difficulty in reaching a conclusion. The purpose of the proposed corporation, as appears from the suggested charter, is "to preach the Gospel according to the doctrines of Christ, as found in the Bible and stated in the tenets of Christian Science."

Among the tenets so described is: "5. We acknowledge the way of salvation demonstrated by Jesus to be the power of truth over all error, sin, sickness and death; and the resurection of human faith and understanding to seize the great possibilities and living energies of divine life."

Accompanying these tenets are certain rules, of which the first prescribes: "To become a member of the First Church of Christ Scientist in Philadelphia, Pa., the applicant must be a believer in the doctrines of Christian Science, according to the teaching contained in the book 'Science and Health, with key to the Scriptures, by Rev Mary Baker G. Eddy.' The Bible and the above named book, with other works by the same author, must be his only text-books for self-instruction in Christian Science, and for practising metaphysical healing."

If the purpose of the proposed corporation were only to inculcate a creed or to promulgate a form of worship, no question could arise, because under the constitution of Pennsylvania belief is beyond public control, and their can be no interference with the right of conscience. But the most cursory examination of the report of the master upon the testimony, and of the tenets, and of the book of Mrs. Eddy, which is placed upon a level with the Bible in the teachings of this church, shows that there is a Christian faith and a science, not only a belief, but a purpose to accomplish practical results; not only an attempt to educate the community to the importance of the recognition of certain ethical principles, but an effort to establish a prescribed method of practising the art of healing the diseases of the body. Thus the rule to which reference has been made declares that the book shall be the only text to be used in "practising metaphysical healing." The master reports that the "maintenance of health and the cure of disease" occupies a large space in the faith of the society. The students of the book have patients who are to be treated according to the method taught. Thus: "To fix truth steadfastly in your patients' thoughts explain Christian Science to them, but not too soon, not until your patients are prepared for it;" page 412. "Explain audibly to your patients as soon as they can bear it, the utter control which mind holds over the body;" page 415.

The treatments extends to the most serious and fatal of diseases rheumatism, scrofula, cancer, smallpox and consumption. "If the case to be mentally treated is consumption take up the leading points included according to belief in that disease. Show that it is not inherited, that inflamation, tubercles, hemorrhage and decomposition are beliefs. * * Then these ills will disappear. If the lungs are disappearing, this is but one of the beliefs of mortal mind;" page 422.

The treatment is declared to be efficacious in surgical cases as well as others. "However, it is but just to say that the author has already in her possession well authenticated records of the cure by herself and her students, through mental surgery alone, of dislocated joints and spinal vetebrae;" page 400.

Nor is the treatment necessarily associated with conditions of faith or belief. That is, it is not confined in the application to those who are adults and who can determine for themselves whether or not they wish their diseases so treated, but it is extended to children and infants whose health or life may depend upon the accuracy of the judgment of those in whose charge they are placed. One witness testified before the master that she would regard it as her duty to withhold medicine from a child or other person to whom her will was law. The book says: "If the case is that of a young child or an infant, it needs to be met mainly through the parents' thought. * * Mind regulates the condition of the stomach, bowels, food and temperature of children and men, and matter does not. The views of parents and other people on these subjects produce their good and bad results in the health of children. The daily ablutions of an infant are no more natural or necessary than would be the process of taking a fish out of water every day and covering it with dirt;" page 411.

The patients, young and old, are also to be treated for a compensation, to be paid to those who work the beneficient results. To the question of the master whether the system permitted any person who was instrumental in making such a cure to receive compensation for the service, the answer was "Yes, in the sense that Jesus said, 'The laborer is worthy of his hire.'" "Let us suppose," says the book, page 420, "that a surgeon is employed in the one case and a Christian Scientist in the other."

It is quite clear, therefore, that what

is proposed is much more than a church, since there is besides to be established a system for the treatment of disease, to be carried into effect by persons trained for the purpose who may receive compensation for their services.

The Act of March 24, 1877, P. L. 42, provides: "It shall be unlawful after the passage of this Act for any person to announce himself or herself as a practitioner of medicine, surgery or obstretrics, or to practice the same, who has not received in a regular manner a diploma from a chartered medical school duly authorized to confer upon its alumni the degree of doctor of medicine," and a violation of the Act is made punishable as a misdemeanor, with a fine of from $200 to $400 for each offence. The object of this Act manifestly is to provide that, for the practice of an art so difficult and abstruse as the treatment of disease, the person so employed must have had the benefit of the learning and experience of the past, so far as it can be given by teaching in the medical schools. It establishes a policy for the Commonwealth which the courts must be careful not to thwart. To grant this charter would be to sanction a sytem of dealing with disease totally at variance with any contemplated by the Act of 1877, and different from any taught in "a chartered medical school." It is possible that the method proposed is correct, but the most important of truths which run counter to long established and popular currents of thought must ever pass through a period of test and trial before they are accepted.

Reforms are proverbly slow. It may be, as we are told in Science and Health, that to look a tiger in the eye with faith is to send him frightened into the jungle; but men, as they are at present informed, are more apt to rely, however mistakenly, upon rifles. For the treatment of the disease called trichinosis, which is caused by animalculae breeding in the body and feeding upon the muscles, they depend upon something which may destroy the creature rather than upon a faith, however sincere, that its ravages will do no harm. Should they in the lapse of time become convinced by the teachings of "Science and Health" that their course is erroneous, no doubt a future legislature will repeal the Act of 1877, but for the present its policy must be enforced.

The learned master, while expressing the thought "that some people may lose their lives through refusing to employ the means which are ordinarily under Providence successful," reports, with reluctance, in favor of granting the charter. We cannot sustain this recommendation. For the reasons given the charter is refused.

Lauber v. Wagner.

Bail—Contribution—Collateral.

Plaintiff became surety in the sum of $1,000 for the appearance of S at a Quarter Sessions Court. Defendant gave plaintiff a common bond in the penal sum of $2,000, conditioned to indemnify and keep harmless plaintiff "from all actions, costs, charges, damages and payments by reason of said obligation." S defaulted and judgment was recovered against plaintiff on the recognizance. He then secured from defendant a judgment, on which was an endorsement specifying that the judgment was given for the purpose of indemnifying plaintiff for one half of the amount he would have to pay, but agreeing that if plaintiff could compromise defendant should "only be required to pay one half the amount actually paid by plaintiff on the judgment obtained against him. This endorsement was signed by plaintiff and defendant. A compromise was effected for $1,010.97, and defendant offered to pay one half of this amount; but plaintiff contended that the $500 abatement he received applied to all the recognizances, and only one-half of it could be used on the judgment. On a rule to open the judgment, HELD, that the defendant can only be called on to pay one-half of the $1,010 97.

There is no allegation or testimony of fraud, accident or mistake in the preparation of the endorsement, and in view of the difference as to its meaning the Court must construe it as it stands.

It must be held to express all their negotiations, bargainings and understandings made prior and leading up to its execution.

Rule to open judgment and let defendant into a defence.

The petition on which this rule was founded was as follows:

To the Honorable the Judges of said Court:

The petition of Jacob Wagner respectfully represents:

That he is the defendant in the above execution. That the above entitled execution was issued on judgment No. 167, January Term, 1896, which was entered on a note with warrant of attorney, under seal, dated the 9th day of April, 1896

That on the back of said judgment note, with warrant of attorney, was written at the time of its execution the follow-

ing endorsement: "The within judgment is given for the purpose of indemnifying and saving from loss the said Michael Lauber of one half the amount that he shall be required to pay on judgment obtained against him in the Court of Common Pleas of York county as surety for the appearance of Charles Still at Court of Quarter Sessions, and in accordance with a bond given by me to said Michael Lauber for said object; but it is hereby expressly understood that if the said Michael Lauber shall compromise and settle said judgment for less than $2,000 and costs that I shall only be required to pay one half of the actual amount paid by said Lauber and no more and that he shall only recover on this judgment the one half of the amount actually paid by him.

Witness my hand and seal the 9th day of April, 1896.

JACOB WAGNER

I agree to the above that I shall recover only one half of amount actually paid by me on said judgment obtained against me as aforesaid.

M. LAUBER."

That said judgment note was given in lieu of and in satisfaction of a certain bond made and executed the 25th day of September, 1895, by your petitioner in the following terms, to wit: "Know all men by these presents, That I, Jacob Wagner, of West Manchester township, County of York and State of Pennsylvania, am held and firmly bound unto Michael Lauber in the sum of Two thousand dollars, lawful money, to which payment well and truly to be made and done I do bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated this 25th day of September, A D. 1895

Whereas the said Michael Lauber has become bail for the appearance at the Quarter Sessions of the Court of York County, Pennsylvania, of Charles Still, defendant, in No. 94, April Sessions, 1895, in the sum of one thousand dollars as by reference thereunto had will more fully and at large appear.

Now the condition of this obligation is such that if the said Charles Still shall appear before the Court in accordance with the terms of said obligation and as by law he is required to do and the said Jacob Wagner shall and do from time to time and at all times hereafter, well and sufficiently save, defend and indemnify and keep harmless the said Michael Lauber, his heirs, executors and administrators of and from all actions, costs, charges, damages and payments for or by reason of the said obligation then these presents and every matter and thing herein contained shall be null and void else to be and remain in full force and virtue.

JACOB WAGNER, [seal.]

Signed sealed and delivered in the presence of JOHN B. CONLEY.

Your petitioner further represents that said bond was given solely and exclusively to indemnify the said Michael Lauber as bail on a recognizance for the appearance of Charles Still in No. 94 April Sessions, 1895, in the sum of one thousand dollars. That subsequently to wit, to No. 15 January Term, 1896, in the Court of Common Pleas of York county, a judgment was recovered by the Commonwealth of Pennsylvania against the said Michael Lauber on said recognizance in No. 94 April Sessions, 1895, for the sum of one thousand dollars, which said judgment the said Michael Lauber has compromised and settled for the sum of $1,010.97 including costs. That in and by the said endorsement on the back of said judgment note, which, as heretofore stated was given in lieu and satisfaction of said bond of indemnity, it was expressly covenanted and agreed by the said Michael Lauber that if the said Michael Lauber should compromise and settle said judgment for less than two thousand dollars and costs your petitioner should only be required to pay one half of the actual amount paid by said Lauber on said judgment and no more and that the said Michael Lauber should be entitled to recover on this judgment only one-half of the amount actually paid by him on the judgment recovered to No. 15 January Term, 1896, on the recognizance entered in No. 94 April Sessions, 1895, for one thousand dollars.

Your petitioner further represents that he actually paid on the 21st day of September, 1896, to counsel for plaintiffs on judgment No. 15 January Term, 1896, the sum of $333 33 being a part payment of the amount for which he became liable to the said Michael Lauber on said judgment No. 1674 January Term, 1896, and that he only owes on said judgment the

sum of $172.65 being the difference between the amount so paid by him as aforesaid and the one-half of the whole amount for which said Michael Lauber settled and compromised said judgment, including costs on same, to wit, $1010 97

Therefore he prays your Honorable Court to stay said execution and to open said judgment and let him into a defence, averring his readiness to pay at any time the said sum of $172.65 and costs, in full payment and satisfaction of said judgment on which said execution was issued, and to grant him such other and further relief as your petitioner's case may require and to your Honors may seem meet; and he will ever pray.

To which the plaintiff replied as follows:

To the Honorable the Judges of said Court:

Michael Lauber, plaintiff in said case, (Judgment and Fi. Fa.) in answer to the petition of the defendant, Jacob Wagner, says that it is true said execution was issued as stated by defendant in his petition and that the endorsements were upon the back of the judgment note as set forth in his, Wagner s, petition, or substantially so.

But that the said judgment note was given in lieu of and in satisfaction of the bond made and executed September 25 1895. by said Jacob Wagner to him the plaintiff inis th case. (The conditions of the said bond being substantially set forth in defendant's petitio 1) is not true.

The said judgment note was taken by the plaintiff from defendant to secure the payment of said bond. And the endorsements on the back of the same were made simply to guarantee to the defendant Wagner one half of any abatement he the said Michael Lauber, the plaintiff, might receive the benefit of upon the several judgments or suits in the said court against him upon the several recognizances which he was on for the appearance of one Charles Still at the Court of Quarter sessions of the Peace of York county, to Nos. 55 94 and 95 of April Sessions, 1895. That after judgments had been obtained against him the said Michael Lauber on said recognizances, which had been forfeited, he and H H Jacobs presented their petition to the Court of Common Pleas of the said county praying for relief, and that upon the return of the rule granted thereon the court directed the Law Library Committe that upon the payment of the further sum of Fifteen hundred dollars together with the costs on said judgments should be satisfied, which was done, thereby saving to the defendants, Michael Lauber and H. H. Jacobs, $500.00, one-half of which he Michael Lauber received the benefit of, viz: $250 00, and that Jacob Wagner is entitled to the benefits of one-half of said sum, viz: $125 00 and no more. Because he the said Michael Lauber was compelled to pay on the several judgments against him the sum of Two thousand dollars and costs less the said abatement of $250.00 as above stated.

It is also true that the said defendant, Jacob Wagner, did pay to Michael Lauber the sum of $333 33 upon his liability on his said bond, for which he has a credit.

He is therefore only entitled to a credit of $125 00 for and by reason of the settlements of the judgments against him Michael Lauber as above set forth.

He therefore prays your Honorable Court that upon giving or allowing the said Jacob Wagner credit for the said $125.00, his petition (Wagner's) be dismissed and he the said Michael Lauber, plaintiff, above named may be allowed to proceed to collect the money yet due him upon said bond and judgment and execution, and he will ever pray, &c.

Latimer & Schmidt for rule.

John W. Heller, contra.

January 10th, 1898. STEWART, J.—Michael Lauber, the plaintiff, became surety for Charles Still in the sum of $1,000 in No. 94 April Sessions, 1895, for his appearance at October Sessions, 1895. Jacob Wagner, the defendant, gave to Lauber a common bond in a penalty of $2,000, containing the following recital: "Whereas the said Michael Lauber has become bail for the appearance at October Sessions of the Court of Quarter Sessions of York county, Pennsylvania, of Charles Still, defendant in No. 94 April Sessions, 1895, in the sum of One Thousand Dollars as by reference thereunto had will more fully appear," with condition to "indemnify and keep harmless, Lauber from all actions, costs, charges, damages and payments by reason of said obligation."

Still made default and Lauber was sued

on the recognizance and judgment was recovered against him. Lauber then secured from Wagner the judgment note upon which this judgment was entered, which is in the usual form with warrant of attorney to confess judgment. To do this he took Wagner to the office of his counsel, who drew the judgment, witnessed it, and wrote the following endorsement on it: "The within judgment is given for the purpose of indemnifying and saving from loss the said Michael Lauber of one-half the amount that he shall be required to pay on judgment obtained against him in the Court of Common Pleas of York county as surety for the appearance of Charles Still at Court of Quarter Sessions and in accordance with a bond given by me to said Michael Lauber for said object, but it is hereby expressly understood that if the said Michael Lauber shall compromise and settle said judgment for less than $2,000 and costs that I shall only be required to pay one half of the actual amount paid by said Lauber, and no more and that he shall only recover on this judgment the one-half of the amount actually paid by him.

Witness my hand the 9th day of April, 1896. (Signed) JACOB WAGNER.

I agree to the above that I shall recover only one-half of amount actually paid by me on said judgment obtained against me as aforesaid.

(Signed) M. LAUBER."

The judgment against Lauber was settled for the sum of $1,010.97 including costs. The defendant paid Lauber the sum of $333.33 and admits and offers to pay $172.65, making a total of $505 98 as in full of his liability on said judgment note.

The plaintiff contends that the judgment was not taken in substitution of the bond, but as collateral to it, and further that he was surety alone for Still in No 94 April Sessions, 1895, but that he was surety also with H. H Jacobs for Still in $500 in one case and in another for $500. That in the settlement of all these judgments aggregating $3,000, he got an abatement of $500 to one-half of which Jacobs is entitled, and the other half $250 is to be divided between himself and the defendant, Jacob Wagner, and that Wagner is therefore only entitled to a credit of $125.00 against the judgment and must pay the remainder. He contends that Jacob Wagner was to have the benefit of one-half of whatever reductions might be made in the settlement of all these recognizances, to a division of his, Lauber's share of the equities. Lauber's counsel testifies that the judgment note was not given in substitution of the bond but as collateral or additional security, and a lien against the defendant's real estate, and was to be "just what the paper says on the back of it, to indemnify him (Lauber) against loss by virtue of the bond. The endorsement on the back of the judgment note is not consistent with the plaintiff's contention. If it was intended to accomplish what he says and what his counsel says was meant by it, the expression of that intention is unfortunate. It clearly does not mean that. The indorsement signed by Lauber is flatly against such a construction. "I agree to the above that I shall recover only one half of the amount actually paid by me on said judgment obtained against me as aforesaid." Not on the judgments obtained against me, nor that I will credit on this judgment one-half of whatever deduction I may receive in the settlement of said judgment or judgments.

It is not readily conceivable what form of language he could have used to more forcibly express the opposite of his present contention.

There is no allegation in the plaintiff's answer of fraud, accident or mistake on the part of the scrivener in the preparation of the endorsement and if there was, it would not be supported by the scrivener's testimony.

The parties have put their agreement into writing and in view of their difference as to its meaning the Court must construe it as it stands. And it must be held to express all their negotiations, bargainings and understandings made prior and leading up to its execution; Woodcock v. Robinson, 148 Pa. 503.

This being so the defendant has paid and offered to pay the one-half of the amount paid by the plaintiff on the judgment recovered against him in accordance with the indorsement on the judg-

ment note, and he can not be held to do more. It is therefore ordered that unless the plaintiff accept from the defendant within ten days the said sum of $172.65 in full satisfaction of said judgment, the rule to open the same shall be made absolute and the execution thereon is stayed until the further order of the Court.

City of York v. Miller.

City License—Collection of—Justice's Record.

Assumpsit was brought before a Justice of the Peace to collect the license required from the defendant as a milk dealer The record substantially says: "Civil suit, summons in assumpsit not exceeding $300. Claim $2.00." Summons issued, &c. "Sept. 29, A. D. 1887, 10 o'clock a. m., plaintiffs appear through their counsel, W. L. Ammon, Esq., defendant not appearing. John W. Brant, City Clerk, appd. for plaintiffs demand $2 00 founded on a claim for a City license tax due from June 1st, 1897 to May 31, 1898, due said City by defendant, under an ordinance duly passed by Select and Common Councils of said City of York and approved by the Mayor on the 16th day of March, 1897. After hearing the several proofs and allegations judgment publicly for the plaintiffs and against the defendant by default for two dollars and costs of suit."

There is no doubt of the City's right to impose and collect a license tax on milk dealers for the sale of milk within the City limits, but when they proceed by suit to collect the license the record, as against a certiorari, must be self-sustaining and show sufficient to put the Court at once on the inspection of the record into the possession of all the facts as well as the ordinance imposing the tax.

The Court is not presumed to know local statutes and City ordinances. In suits upon them they must be specially pleaded. Hence the necessity of the Alderman's record referring to them to show his jurisdiction.

It is not necessary that the Justice enter upon the record in a civil suit the evidence by which the plaintiff's claim is sustained, but only the kind of evidence upon which it is *founded*.

Certiorari.

The transcript in this case is as follows:

Civil suit, summons in assumpsit, not exceeding three hundred dollars Claim $2.00. Issued to John L. Ruhl, constable, on the 22nd day of Sept., A. D. 1897, returnable on the 29th day of Sept., A. D. 1897, between the hours of 9 and 10 o'clock a. m. Sept. 24th, A. D. 1897, summons returned served by leaving a copy at defendant's dwelling house in the presence of an adult member of his family on this 24th day of Sept., 1897, as answers on oath John L. Ruhl, constable. Sept 29th, 1897, 10 o'clock a. m., plaintiffs appear through their counsel W. L. Ammon, Esq. Defendants not appearing John W. Brant, City Clerk appd. for plaintiffs demand $2.00 founded on a claim for a City License tax from June 1st. A. D. 1897, to May 31st, 1898, due said city by defendant under an ordinance duly passed by Select and Common Councils of said City of York, and approved by the Mayor on the 15th day of March, A. D. 1897. After hearing the several proofs and allegations, judgment publicly for the plaintiffs and against the defendants by default for two dollars and costs of suit. October 6th, A. D. 1897, execution issued to John L Ruhl, constable, by request of W. L. Ammon, Esq., counsel for plaintiffs, returnable October 26th, A. D. 1897. October 6th, A. D. 1897, received a writ of certiorari from the Court of Common Pleas of York County, returnable on the Third Monday of October, A. D. 1897. October 18th, A. D. 1897, writ returned with all things touching the same as requested.

The following exceptions were filed:

1st. The alderman's jurisdiction does not appear affirmatively of record.

2nd. The alderman has no jurisdiction in the matter.

3rd. The *nature* of the contract or claim is not shown by the record to be such as is cognizable by an alderman.

4th. The record is defective in not only not showing jurisdiction but in failing to show the proof sufficient to sustain every material point to make a valid judgment.

5th. The record fails to disclose the *nature* of the evidence.

6th. That the ordinance of March 16, 1897, for York, Pa., under which the City seeks to collect the license tax from the defendant does not profess to be an exercise of the police power for the regulation of the trade in milk, and therefore is void and invalid, and said defendant is not liable for said license tax.

7th. That the City of York has no authority to levy or collect a license tax from a milkman (of which class defendant is one) under the ordinance of March 16, 1897.

Niles & Neff for exceptions.

W. L. Ammon, contra.

January 10th, 1898. STEWART, J.—

This was a proceeding before a Justice, an action of assumpsit to collect from the defendant the amount of a license required by a city ordinance to be paid by the defendant as a milk dealer. The important part of the record is as follows: "Civil suit, summons in assumpsit not exceeding $300. Claim $2.00." Summons issued, &c. "Sept. 29, A. D. 1897, 10 o'clock a. m., plaintiffs appear through their counsel, W. L. Ammon, Esq., defendant not appearing. John W. Brant, City Clerk, appd. for plaintiffs demand $2.00 founded on a claim for a City license tax from June 1st, 1897 to May 31, 1898, due said City by defendant, under an ordinance duly passed by Select and Common Councils of said City of York and approved by the Mayor on the 16th day of March, 1897. After hearing the several proofs and allegations judgment publicly for the plaintiffs and against the defendant by default for two dollars and costs of suit."

[The Court then recites the exceptions.]

It is necessary to sustain the first exception, namely that the Alderman's jurisdiction does not appear affirmatively of record. There is no question but what the Alderman had jurisdiction of the subject matter and the parties, and I have no doubt of the City's right to impose and collect a license tax on milk dealers for the sale of milk within the City limits, but when they proceed by suit to collect the license the record, as against a certiorari, must be self-sustaining and show sufficient to put the Court at once on the inspection of the record into the possession of all the facts as well as the ordinance imposing the tax. In this case this is not done. All that the record shows as the basis of this claim is: "Demand $2.00 founded on a claim for a City license tax from July 1st, 1897 to May 31st, 1898, due said City by defendant under ordinance duly passed by Select and Common Councils of said City of York approved by the Mayor on the 16th day of March, A. D. 1897." A license to do what? This record gives no answer. Imposed upon whom and why upon the defendant? Upon this subject the record is equally silent. Again upon what subject was this ordinance passed? I find no less than seven ordinances approved by the Mayor on that day. It has been frequently said that the record should contain at least the substance of the ordinance, and ought also contain its title so that the defendant may know by a reference to the ordinance what he is being sued for. The Court is not presumed to know local statutes and City ordinances. In suits upon them they must be specially pleaded. Hence the necessity of the Alderman's record referring to them to show his jurisdiction; Pittsburg v. Madden, 3 Dist. Rep. 771; Kerr v. Turnpike, 5 Dist. Rep. 564; Dillon on Municipal Corp. Sec. 413 416.

The 2nd, 3rd, 4th and 5th exceptions are dismissed without merit.

It is not necessary that the Justice enter upon the record in a civil suit the evidence by which the plaintiff's claim is sustained, but only the kind of evidence on which it is *founded*. The 4th Section of the Act of 1810 requires the Justice to enter on his docket "the kind of evidence upon which the plaintiff's demand is *founded* whether upon note, bond, penal or single bill, writing obligatory, book debt, damages or assumption" or whatsoever it may be, but not the the kind of evidence by which it is proved; Cook v. Minick, 1 C. C. R. 603; Wilson v. Wilson, 3 Clark 419: McIntyre v. Ecelduff, 1 S. & R. 21; Holden v. Wiggins, 3 P. & W. 472.

The 6th and 7th exceptions raise the question of the City's right or power to pass the ordinance under which this license is required. As stated before, I have no doubt upon this question, which is sufficiently shown by Harrisburg v. Deimler, 6 Dist. Rept. 532; Harrisburg v. Telephone Co., 3 Dist. Rept. 815; Williamsport v. Wenner, 172 Pa. 178.

The first exception is sustained and the proceedings are set aside.

C. P. of Monroe Co.

Wilson v. Merwine.

Attachment execution—Garnishee—Interrogatories—Answers thereto—Practice.

In answers to interrogatories the garnishee need give such facts only as are material to the admission or denial of indebtedness to the defendant, and judgment cannot be entered against him unless he expressly or impliedly admits his indebtedness or his possession of assets belonging to the judgment debtor.

It cannot be said as a matter of law, that the giving of a check by the judgment debtor to the garnishee, even if entirely voluntary, is a fraud on the plaintiff.

Rule for judgment against garnishee, for want of sufficient answers to interrogatories.

C. B. Staples for plaintiff.

Cicero Gearhart for Garnishee.

November 27, 1897. CRAIG, P. J.—This a motion for judgment against Marshall Merwine, the garnishee, upon his answers to the interrogatories and additional interrogatories filed. The law applicable to a proceeding of this kind is so fully stated by Chief Justice Sterrett in McCallum v. Lockard, 179 Pa. 429, that we can do no better than give it here: A garnishee's answer is not to be construed with the same strictness as an affidavit of defence. He is not bound to set forth specifically and at length the nature and character of his defence to the attachment but such facts only as are material to the admission or denial of indebtedness to the defendant. If his counsel advise, or he himself thinks a question is improper, he is entitled to instruction by the court. Wood v. Wall, 24 Wis. 647. He is not bound to submit to every conceivable question under penalty of paying the whole debt. For insufficient answer the plaintiff may accept or demur; T. & H, Prac., Sec. 1202. But judgment cannot be entered against the garnishee unless he expressly or impliedly admits his indebtedness, or his possession of assets belonging to the judgment debtor; Bank v. Meyer, 59 Pa. 361. There must be a distinct admission of liability such as leaves no doubt; T. & H., Prac. Sec. 1202. The admission of indebtedness, like a special verdict, forms the exclusive foundation of the judgment. If the facts stated appear to be insufficient to entitle plaintiff to judgment, the court should refuse it and discharge the rule, leaving the plaintiff at liberty to rule the garnishee to plead to issue and go to trial; Bank v. Gross, 50 Pa. 224.

It is clear that the garnishee in his answers does not admit, expressly or impliedly, his indebtedness or his possession of assets, belonging to the judgment debtor. It is urged however, that because the judgment debtor was indebted to the plaintiff at the time the check was given by him to the garnishee, to an amount larger than the alleged gift, this of itself was a fraud upon his creditors and without consideration and void, and that, therefore, the garnishee is liable to pay the same to the plaintiff We cannot assent to this as a legal proposition. A gift or conveyance is not void under the statute of 13 Elizabeth simply because the person making either of them was indebted at the time. In Reed v. Reed, 12 Pa. at page 117, the law is stated thus by Rogers Justice: "For although a person may in the abstract be largely indebted, yet if the debts are not large in proportion to his property, a voluntary conveyance may be good notwithstanding. This distinction is taken in Mateer v. Hissim, 3 Pa. Rep. 160, and is the undoubted law of the State. It is there ruled, that the statute of 13 Elizabeth does not render a conveyance void made by a man simply because he was indebted. The debts must bear some proportion to the property of the grantor which may render the payment of his debt doubtful."

To the same effect are; Posten v. Posten, 4 Wharton 27; Townsend v. Maynard, 45 Pa. 199; Clark v. Depew, 25 Pa. 509; Chambers v. Spencer, 5 Watts 404; Ex Parte Blair, McClenachan, 2 Yeates 502; Adams v. Hitner, 104 Pa. 166.

We cannot say as a matter of law, that the giving of the check by the judgment debtor to the garnishee, even if entirely voluntary, was a fraud on the plaintiff. For aught we know the judgment debtor at the time was possessed of ample means to pay his debts. Proof of this would repel the presumption of fraud.

It no where appears in the answers, or the proceedings thus far, that the judgment debtor was not possessed of sufficient property to pay his debts at the time he handed the check to the garnishee. The plaintiff sought to disprove this by an interrogatory to the garnishee, but the answer was that he had no knowledge thereof.

It may be that the defendant debtor was insolvent at the time of the alleged gift of the check. If this were a fact established. we might grant this motion. But it is not established, and we cannot presume it against the defendant debtor at this stage of the proceedings.

The motion is overruled.

York Legal Record.

Vol. XI. MARCH, 1898. No. 9.

ORPHANS' COURT.

Breeswine's Estate.

Auditor's Report—Effect of—Debt—Limitation.

The Auditor distributing the balance on the account of A's administrator awarded $245.42 "to the child of Eliza Herming one equal share, the name and whereabouts of said child being unknown." This sum was retained by the administrator. About twelve years afterward the administrator died, and before the Auditor distributing his estate this share was presented as a claim against his estate. The Auditor rejected it. HELD; on exceptions filed, that the report must be set aside.

The share awarded to this child became a debt of record by the decree of the Court, in confirming the Auditor's report in which this distributive share is awarded. Nothing short of twenty years from the confirmation of the report will raise a presumption of payment, of the amount decreed by the Court.

Interest cannot be allowed on the award because the same was held by the administrator, now deceased, subject, at all times, to the demand and payment to the party or parties entitled to the same.

The amount claimed could not be awarded to an administrator of said child, because there was no proof or presumption of death, but it could be impounded for said child or his legal representatives.

Exceptions to Auditor's report.

The report of George W. Heiges, Esq., relating to the matter in dispute, is as follows:

The next and only other claim to be considered. and about which there has been serious contention, is that presented by the late S. H. Forry, Esq., and since his death, strongly urged by James G. Glessner, Esq., to wit, the claim in behalf of the heirs of the child of Eliza Herming, deceased, who was intermarried with one Taylor, said child being supposed to be dead, and to whom was awarded the sum of $245.42, as appears by the Auditor's report in the estate of Christian Herming, deceased, filed July 19th, 1880, recorded in Book 2 X page 298, said heirs being George Herming, uncle of said child, Sarah Myers, an aunt, and others named in said Auditor's report."

The said Auditor's report was offered in evidence by Mr. Forry in support of this claim and especially the part of the report as follows:

"To the child of Eliza Herming who had intermarried with one Taylor, but who is now deceased one equal share, the name and whereabouts of said child being unknown, the sum of $245.42."

The purpose of the offer stated by Mr. Forry is as follows: "for the purpose of establishing the claim of these heirs to said sum of money which the record shows was never paid out to any one by the said Peter Breeswine, Administrator of the estate of the said Christian Herming, deceased."

Mr. Forry also asked that if the evidence in this case does not warrant the Auditor in awarding this sum of money to the heirs of this child, that he should then award it to an administrator of this child, who is supposed to be dead, hereafter to be appointed or direct that the administrator of the estate of Peter N. Breeswine deceased, pay the said money into Court for the said child if living, or if dead to those interested in the estate of said child. Mr. Forry also claimed interest on the sum of $245.42, awarded as aforesaid A. D. 1880, seventeen years ago.

The Auditor disallows this claim for the reasons hereinafter following:

The Auditor's report invoked in support of this claim was filed July 19th, 1880, almost seventeen years ago. Your auditor was appointed to make distribution of the estate of Peter N. Breeswine on the 9th, day of April A. D. 1896, fourteen months ago. In all the time elapsing since the appointment of your Auditor no proof was produced before your auditor to show that a "child" of the said Eliza Herming, deceased, ever existed, or if it ever had an existence has died since the above mentioned award. The auditor can therefore neither award the said sum of $245 42 to an administrator to be raised upon the presumption of the death of a person who has not been proved to have ever existed, nor has your auditor any power or authority in the premises to direct the accountant to pay this sum of $245.42, or the sum with interest amounting to more than the sum

itself, into Court, for the purpose asked, or for any purpose whatever.

How stands the demand that this sum should be awarded to the heirs of this supposed child whose "name and whereabouts" were "unknown" to the learned auditor who made the award nearly seventeen years ago?

The said auditor's report discloses the following facts, viz: That one Christian Herming, then a resident of the Borough of York executed his last will October 6th, 1846 which was duly probated ater his death, Februarv 20th, 1847. The late Abraham Forry, father of the late S. H. Forry, Esq., who presented this claim before the auditor, being the executor thereof. The testator in his will bequeathed the use of all his estate real and personal to his wife, Catharine Herming, during life or as long as she remained his widow and after her marriage or death his real estate was to be sold and his entire estate to be divided among his five children, share and share alike.

His widow never married, and upon her death, in 1879, letters d. b. n. c. t. a. were issued to the decedent, Peter N. Breeswine, who sold the real estate of the testator under an order of the Orphans' Court of York county for the purpose of distribution in accordance with the will of the testator, and distribution was accordingly made July 19th, 1880.

At the time of the distribution, the auditor found and reported that at the death of testator's widow two of testator's children who had attained lawful age were dead, viz: Frederic Herming who left to survive him a daughter, Ida C , intermarried with one Jackson, and Eliza who was intermarried with one Taylor "leaving a child, the name, sex and whereabouts unknown to the auditor," and that testator's surviving children at the date of distribution were Amelia, intermarried with one Myers and George O. Herming, and awarded to each of them the sum of $245.42, and to the said Ida C. Jackson, and to the "child" of Eliza Herming, deceased, whose "name, sex and whereabouts" were unknown, the same amount was awarded. The late S. H. Forry, Esq., it appears from the records was counsel to the executor, as well as to Peter N. Breeswine, his successor in the administration of the estate.

The statute of limitations has been invoked by the learned counsel of decedent's grand children to defeat this claim and very properly and rightly as your auditor conceives.

It was shown by the learned counsel who succeeded the late S H. Forry, Esq., as counsel for claimant that by releases offered in evidence that George Herming, Amelia Pohlman and Sarah Myers had been paid the several amounts awarded to them early in 1881, and that Ida C Jackson had been paid the amount awarded to her in August, 1881.

The testimcny of the accountant was taken, obviously for the purpose, though no purpose was stated by Mr. Glessner, who called him as a witness, to show a recent acknowledgement on the part of the decedent of the indebtedness. Assuming that what the witness testified to is a correct statement of what the decedent said to the witness, what passed between father and son, it is absolutely insufficient to toll the statute of limitations, nor is what the decedent is alleged to have said to Mrs. Kleffman as testified to by the witness of any greater force or effect. Most of the conversation testified to were between a father and son in the confidential relations of family intimacy, the son by his own showing on the witness stand, having no interest in this sum of money; nor can what the witness testifies his father said to Mrs. Kleffman have any possible weight, as she was a stranger to the estate and doubtless also had no interest in the money in question.

In the auditor's view, after the award was made A. D. 1880, by the auditor appointed to distribute the estate of Christian Herming, deceased, to the "child of Eliza Herming," after a reasonable time had elapsed, during which time these claimants should have shcwn that there never was such a child or that if there had been, it was dead, and raised up an administrator upon its estate, the relation of debtor and creditor sprang up between Peter N. Breeswine and these claimants if there never was such a child, or had been and it is dead; and that they have left the opportunity slip from them. If there had been a "child" as contem-

plated by the auditor in the Herming Estate at any time after, say September 1st, 1887, no exceptions having been filed to said auditor's report, its death, in law, would have been presumed and an administrator could have been raised up upon its estate by any one interested and demand could have been made upon the decedent for the money; and if payment was refused their remedy being by a suit-at-law, a right of action then having commenced, at least seven years ago, their claim is assuredly now defeated by the statute of limitations interposed by those who clearly have the right to plead it. This view is sustained by the following authorities cited by Mr. Cole, to the point that the statute of limitations begins to run whenever the right of action accrues, viz: Hoskins' Administrators v. Lindsay et al., 3 YORK LEGAL RECORD 75, and cases therein cited, viz Kane v. Bloodgood, 7 John Ch. 110; App and Another, executors of App v Driesbach, 2 Rawle 302. In the last above recited case it is held that when an executor has settled his account, exhibiting a balance in his hands, he ceases to be a trustee, and becomes a debtor for such balance to the legatee. A fortiori this was the case of the decedent who was involuntary made the custodian of this award at its making. See also Lyons v. Marclay, 1 Watts 271 and 275; Zacharias v. Zachrias, 11 Harris 452; Cambell's Ad. v. Boggs, 12 Wr. 524; Barton v. Dickens, Ib. 518 and 522. No authorities were cited by Mr. Neff and Glessner.

"Cases of trust, not to be reached or affected in equity by the statute of limitations, are those technical and continuing trusts, which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity; it must be a direct trust, belonging exclusively to the jurisdiction of a court of equity, and the question must arise between the trustee and cestui que trust;" Lyon v. Marclay, 1 Watts 271.

The testimony before the auditor does not disclose proof of a sufficient acknowledgment and promise by the decedent, sufficiently explicit and unambiguous to take the matter in question out of the statute as required by the authorities.

Yorke's Appeal, 110 P. S. R. 79, defines the trusts to which the statute of limitations does not apply as follows: Direct and continuing. 2. Exclusively cognizable in Equity. 3. Arising between trustee and cestui que trust.

The facts and circumstances involved and surrounding the possession of the money in dispute, at one time, undoubtedly by the decedent, can not be tortured into falling under any one of the above characterizations of limitless trusts, if trustee the decedent ever was of this fund of $245.42. The claim of the heirs of a child of Eliza Herming, deceased, supposed to be dead, and the claim of the heirs and legatees of Christian Herming, deceased, all or any one of them, to the said sum of $245.42 is therefore disallowed and the balance on the account, after deducting the expenses of this audit is awarded to George M. Breeswine and Edward M. Breeswine, children of Jamos C. Breeswine, a deceased son of the decedent, in equal parts, share and share alike.

To this report the following exceptions are filed by the counsel for Henry Taylor, administrator:

The auditor erred in not awarding the sum of $245.42, with interest from July 19, 1880, to the administrator of Henry Tavlor, deceased, he being the child of Eliza Herming, mentioned in the within report.

Niles & Neff for exceptions.

Latimer & Schmidt for report.

Jan. 3rd, 1898. BITTENGER, P. J.—The exceptions are to the distribution by the Auditor after deducting the expenses of the audit, of the balance on the account of George Breeswine, administrator of Peter N. Breeswine, dec'd. to Edward M. Breeswine and George M. Breeswine, instead of first impounding $245.42 for the use of the party who was the child of Eliza Hermig or his legal representatives, if he is deceased.

The claim now represented by Messrs. Niles & Neff who filed the exceptions, was first made, before the Auditor, by Silas H. Forry, Esq., now deceased, and afterwards by James G. Glessner, Esq. Before the Auditor's report was filed there was not any evidence of the death of the child of Eliza Taylor, and of

course, there was no administrator making the claim. Niles & Neff, during the hearings before the Auditor, represented George W. Breeswine as an heir claiming half the estate, and objected to the allowance by the Auditor, of the claim in question. It was only after it had been made to appear that George W. Breeswine was not entitled to participate in the distribution by reason of his large indebtedness to his father at the time of his death; and after the filing of the Auditor's report that an administration was raised on the estate of Henry Taylor, dec'd., and Messrs. Niles & Neff appeared for the exceptant.

It appears from the report that Mr. Forry when he appeared on behalf of the claim before the Auditor, asked "that if the evidence in this case does not warrant the Auditor in awarding the sum of money to the heirs of the child, who is supposed to be dead, that he should then award it to his administrator hereafter to be appointed, or direct that the administrator of the estate of Peter N. Breeswine, deceased, pay the said money into Court for the said child, if living, or, if dead, to those interested in the estate of said child."

The Auditor finds, as he was compelled to find from the evidence, that an award was made by the Auditor in the estate of Christian Hermig, deceased, which report was filed July 19, 1880, of the amount claimed, viz. $245.42 "to the child of Eliza Hermig who had intermarried with one Taylor, but who is now deceased, one equal share, the name and whereabouts of said child being unknown. The evidence is that the other shares of the heirs awarded by said Auditor, had been paid out and releases were found among the papers of said Peter N. Breeswine, deceased, but that this share had not been paid out. The papers in connection with the testimony of George W. Breeswine clearly establish this. It was not and cannot now be seriously contended that this sum was paid out by Peter N. Breeswine. the administrator of that estate, in accordance with the report of the Auditor and the decree of the court.

The Auditor, in his report, treated the share in question as still due and unpaid, but rejected it because of the long time which has elapsed, and as barred by the Statute of Limitations.

In this, he is clearly in error. This became a debt of record by the decree of the Court, in confirming the Auditor's report in which this distributive share is awarded. Nothing short of twenty years from the confirmation of the report will raise a presumption of payment, of the amount decreed by the Court.

The Auditor could not award the amount claimed on the said decree of the Court to an administrator of the child of Eliza Hermig, deceased, referred to in the report, because there was no proof of death; and he not having at any time resided here and not having been heard from for seven years, he could not, under the statute, be presumed to be dead.

The Auditor could, however, and as requested by Mr. Forry when he appeared before the Auditor and presented the claim, should have impounded the amount for said child or his legal representatives, if he is deceased, and awarded only the balance, to the said Edward M. Breeswine and George M. Breeswine, the grandchildren of the decedent.

Interest cannot be allowed on the award because the same was held by Peter N. Breeswine, administrator, now deceased, subject, at all times, to the demand of and payment to the party or parties entitled to the same.

The report of the Auditor is set aside, and it is ordered and decreed that the balance for distribution ($893.33) after deducting expenses of audit be paid as follows: That the sum of $245.42 be impounded for the use of the said child of Eliza Hermig as awarded by the Auditor in the estate of Christian Hermig, deceased, or the legal representative of such child, and that said amount be paid into court for said use, to be deposited by the court, at the best rate of interest obtainable therefor, the principal and accrued interest thereon to be paid to the heir to whom the said amount was awarded, and decreed by the court, or to his legal representatives, upon the production to the Court of satisfactory legal proof, and the balance, viz. $647.91 is awarded in equal shares, to Edward M. Breeswine, $323.95½, to George M. Breeswine, $323.95½.

Wirt's Estate.

Executors—Commissions—Interest.

Where the estate is very large and the moneys are invested in securities such as bonds, stocks, bank deposits, &c, not requiring conversion but which may be conveniently distributed among the heirs or legatees and the trouble and responsibility of the accountant is thus lessened, in the absence of litigation, three per cent. will be deemed sufficient compensation.

Accountants having received a commission of five per cent. upon the real estate account filed by them, because the heirs filed their assent in writing, such excessive allowance will be taken into consideration in fixing the compensation in the account of the personalty.

An account which sometimes takes separate credit for actual cash disbursements and credits other cash disbursements as a loss in the principal sum received on a particular loan, is misleading and confusing.

Exceptions filed to such an account are properly filed, and the costs of audit should be imposed, not on the estate, but on the accountants.

The executors deposited in bank the funds of the estate, and had the same on deposit in amount from $3,131.88 to $8,347.44 for a period of three years. The bank paid three per cent. interest when money was deposited on yearly certificates. HELD, that this account must be charged with the interest they could thus have obtained.

Rule to show cause why executors should not be surcharged with excess of allowance.

C. J. Delone and *N. M. Wanner* for rule.

Ed. Chapin contra.

March 1st, 1897. BITTENGER, P. J. —George N. Forney and Robert N. Wirt, executors of the will of Henry Wirt, late of Hanover Borough, deceased, on the 14th day of December, 1896, filed their final account in the office of Register of Wills of York County. Said account was duly advertised and presented to the court for confirmation on the 1st day of January, 1897. They charge themselves with $20,422.30, and after claiming losses, disbursements, counsel fees and allowance for trouble and responsibility, show a balance in their hands for the heirs of $9,091.94.

The allowance claimed for trouble and responsibility, travelling expenses, &c., is $1,000 00, a little less than five per cent. upon the whole amount on the debit side of the account.

The accountants claim credit in the account for $8,006.57 for losses on the loans covered by the account. It appearing on the face of the account that no portion of said sum of $8,006.57 passed through the hands of the accountants and that the allowance claimed by them exceeded the maximum, five per cent., allowed executors, administrators and trustees, in the administration of personalty, in this court, by over $400.00, the court refused to pass said account.

At the instance of Wm. H. O'Neill, this rule was subsequently granted, E. Chapin, Esq., appearing to it for the accountants.

From the answer filed on February 22, 1897, it appears that many of the securities uncollectable and for which credit was claimed in the account, were Western Farm Mortgages, on lands in the State of Kansas, the collection of which was attended with difficulty; that in many cases only portions of the money secured by said securities could be realized, and that George N. Forney, one of the accountants, found it necessary in the collection of said moneys to go to Kansas and remain there for a considerable time; and that by his effort the sum of at least $3,000.00 was saved to the estate. That the expenses incurred by the accountants in travelling to Kansas and other expenses, including expenses of a similar character in connection with the collection from the estate of Robert Hare Powel, in Philadelphia, amounted to over $300.00.

No replication has been filed, and the averments of the answer are therefore admitted. Besides a paper has been filed admitting said facts by C. J. Dellone, Esq., counsel for W. H. O'Neill, the complainant.

The ordinary commission of an executor who has carefully managed an estate is five per cent., and more than that will not be allowed without evidence of unusual services or responsibility; compensation, however, is the rule, and when the executor has had to encounter extraordinary difficulties and responsibility he is entitled to be compensated accordingly; Gilpin's Est., 138 Pa. 143.

This is the rule in this court, in the administration of personalty. Where

the estate is very large and the moneys are invested in securities such as bonds, stocks, bank deposits, &c., not requiring conversion but which may be conveniently distributed among the heirs or legatees and the trouble and responsibility of the accountant is thus lessened, in the absence of litigation, three per cent. will be deemed sufficient compensation.

On the other hand, where extra trouble is incurred in the administration arising out of a confused condition of the estate, as in Gilpin's Est., *supra*, or where the assets of the estate are difficult of collection, involving litigation and unusual expenses; or when moneys are necessarily expended in the execution of the trust, or where the estate is so small that five per cent. will not be just compensation to the trustee, a larger amount than five per cent. is allowed. The compensation varies with the conditions and circumstances attending the settlement of the estate. We frequently, in the case of real estate funds, allow more than three per cent. commission, the usual rate, where frequent sales are necessary to obtain a sufficient price for the lands, and in all cases where the accountant claims additional allowance and satisfies the court that he is equitably entitled to the same.

Here the accountants show a condition of extraordinary responsibility and trouble and expense by reason of over $8,000 00 of the estate being invested in farm mortgages in a distant state and in an insolvent estate in Philadelphia, requiring more than ordinary vigilance and care; and involving additional service on the part of the accountants, and expenses in the discharge of their duties. These extraordinary expenses exceed the sum of three hundred dollars and entailed upon the accountants services in the settlement of the estate extending through a period of over four years, from the filing of their first account.

In that account the accountants took credit for the sum of $4.898.25, five per cent on the whole personal estate embraced in the account, exclusive of the uncollected securities (those embraced in the account now before us.) When it appears from said first account that $51,317.57 of the moneys charged in said first account consisted of trust moneys of George Bittinger, ($1,402.57, deposited in bank, and securities amounting to $49,915 00, bonds and certificates of stock, not converted but simply handed over to Louisa F. Wirt under the provisions of the will,) and other moneys and securities, this was excessive compensation and could not have been allowed, had objection been made or exceptions filed.

Excessive commissions were allowed upon the real estate account, filed April 28th, 1892, (five instead of three per cent ,) because the heirs residing within the jurisdiction of the court assented thereto in writing. The executors have already received out of this estate $5,728.25 in commissions, and claim upon this, their final account, an additional $1.000.00

It is true that the distributees did not except to the compensation claimed, and that the accounts are confirmed and the balances in all probability paid to the parties entitled thereto, but we think we are required to take notice of the compensation already received by the accountants, when objection is now made to the allowance claimed on this their final account.

We are of opinion that the allowance claimed on the account before us is not excessive, considering the extra care and responsibility in the securing and collection of the moneys, including travelling expenses, but the credit claimed is clearly excessive, when added to the very liberal and large compensation already received in the settlement of the estate.

This court, in an opinion in Hersh's Estate, not reported, delivered March 26, 1884, concurred in by both Judges, Wickes and Gibson, surcharged the accountant with the sum of $7,822.40 for commissions charged for taking care of the real estate of the testator, because the services were more than compensated by the large sum charged on his first account, and this, "notwithstanding the release executed by the recipient of the estate, or any paper since filed by him in this court."

We feel it our duty in this case to refuse to confirm the account with the large additional compensation claimed, in view of the large amount already received by the executors. It would be both unfair to the legatees and setting a bad precedent, which must in all cases be avoided.

The counsel for the rule has signified his willingness to allow five per cent. on the account, and doubtless that, together with the sums already received by them for their services, should fully compensate them for their trouble and responsibility as well as moneys expended in the administration of the trust.

Inasmuch, however, as no exceptions were filed to the allowance claimed and received in the two partial accounts already confirmed we hesitate now to make this rule absolute, and surcharge the accountants with the whole excess of compensation claimed for their services.

We think, however, after a careful examination of the facts and the authorities applicable, that the allowance of $800.00 to the accountants, in view of what they have already received, would be most liberal compensation.

We therefore surcharge the accountants with $200.00, making their allowance on this account $800.00; and fix the balance on their final account at $9,202.36; and the account as thus amended is, this 1st day of March, 1897, confirmed, *nisi*.

An Auditor was appointed to settle exceptions to the account. To his report exceptions were filed.

C. J. Delone and *N. M. Wanner* for exceptions.

Ed. Chapin, contra.

After passing upon various findings of facts by the Auditor, the Court's opinion is as follows

January 21, 1898. BITTENGER, P. J. —The account, though stated in the usual and proper method, viz: by charging the accountants with the appraised value of the securities uncollected at the time of filing the second account, and claiming credit for the losses on each of the loans embraced in the inventory, does not show the dates when the principal of the several loans was obtained by the accountants, or the amounts received on the principal of said loans, respectively. The account is misleading, because the accountants take credit for some actual cash disbursements made by them as separate items of credit, and other cash disbursements they credit as a loss in the principal sum of the amount received from their agent and attorney, on the particular loan. In some of the loans the accountants deduct from the income, the expenses connected with the collection of the loan, and in others they deduct from the amount collected on the principal. Therefore the accountants' method of stating their last account is not uniform, and for that reason the debit and credit side, of the account are confused. These facts are apparent, on examination of the account, and should have been found by the Auditor. The facts are material in ascertaining how long the moneys of the respective loans remained in the hands of the accountants, before the filing of their account, and in the determination of the question whether the accountants shall be charged with interest on the moneys of the estate in their hands, and the amount thereof if they shall be held by the Court liable for interest.

The said facts are also material in determining whether the exceptant was required to file exceptions to the account, as his only means of obtaining a proper understanding of the account and the status of the estate, and the proper amount chargeable to the accountants, thus involving the expenses of audit and the determination of liability for the costs of audit. They are conclusive in fixing the liability for costs, when that question is reached by the Court.

The request upon the Auditor to find that the accountants have not charged themselves with the actual amount of cash received by them, was improperly refused. That the accountants have not accounted for the whole amount for which they are liable, is established by the finding of the Auditor in his report in which he surcharges the accountants with the sum of $41.23. In the refusal to find the fact embraced in said request, the Auditor clearly erred.

The Auditor ruled improperly in refusing to find, as requested in No. 277, that it does not appear that the accountants consulted with the residuary legatees, as to their management of the Robert Hare Powell claim, or that the accountants ever procured a cautionary order of the Court, on a statement of the facts, to invest or hazard the funds of the estate, in the manner shown by the testimony.

This written request should have been affirmed. We do not, however, regard this error as material, as the accountants were not required to consult the heirs.

A cautionary order, if it had been applied for, to the Court, would doubtless have been made, as requested. And we are not satisfied, from the evidence, that there was any gross negligence or mismanagement by the accountants in regard to this loan for which they should be held accountable or be surcharged.

The estate embraced in this account was difficult of management. The accountants acted as they deemed best for the estate, and that a heavy loss occurred was the fault of the investment and not of the executors. And even if any mistake was made in collecting these loans resulting in a loss, it was an error of judgment which can impose no legal liability upon the accountants.

In regard to all the loans involved, many of them in Kansas, far from the accountants, and difficult of management and collection on account of financial troubles and depreciation in the value of real estate, the evidence shows no gross negligence or mismanagement by the accountants, entailing loss upon the estate. The executors had to act through representatives there, who had, of course, to be paid for their services. The correspondence in evidence, and their own testimony, show much effort on their part, to properly discharge their duties and protect the estate, to the best of their judgment and ability. The Auditor justly finds these facts, and further, that there was no unnecessary delay in the collection.

No evidence was produced by the exceptant to charge the accountants with any rents or receipts of any character, other than the amount embraced in their statement, and the surcharge added to the balance, by the Auditor. The evidence given by the accountants, sustains this view, and it is corroborated by the correspondence and papers in evidence, as exhibits.

The Auditor's rulings on points for conclusions of law on commissions, are sustained, because the points asked him to find illegal commissions on the first and second accounts filed by the executors, after the payment out of the balance to the legatees and their receipt of the same without objection; thus estopping themselves from excepting to such alleged excessive commissions. They thus assented to the retention, by the accountants, of the said commissions. Besides the matter of commissions had been adjudicated by this court, in an opinion filed, and the amount of commissions was fixed on this account, at $800.00. At said amount the Court confirmed the account *nisi*.

After a careful consideration of the matter, the heirs having by the receipt of their shares on the first and second account as stated, including the commissions, assented to the same as charged, we do not think the amounts already received by accountants should now be held as exorbitant and illegal. There was over $300 00 expended by the executors in a trip to Kansas to secure the loans and dispose of the land, and in caring for the interests of the estate.

The trouble and responsibility of the accountants since April, 1892, when the second account was filed, amply warrant the amount of $500.00 and these expenses incurred by the executors; as allowed by the Court in its opinion filed, and we do not think it should be decreased.

The seventh and eighth exceptions to the Auditor's report are therefore dismissed.

The fifth exception is dismissed because the Auditor was requested to surcharge the accountants with full interest, and the point is too radical in its terms. The sixth exception is also dismissed for reasons before stated, the evidence not calling for the rejection of credits specified. The Auditor's fee has not been shown to be excessive Therefore the twelfth exception is dismissed. Number seventeen is dismissed for reasons already stated.

There remain for consideration, the questions of interest and costs of audit, raised in the first, ninth, tenth, and sixteenth exceptions.

The first exception is sustained, for the reasons already stated. The account was not stated with uniformity, and upon its face is not intelligible. It fails to show the amounts received on each loan, and when said respective amounts were received, as we have shown. It does not show the losses on each loan, except as complicated with fees and expenses of collection included, in many cases. In it the accountants failed to charge themselves with all the moneys with which

they were chargeable in their hands, as is found by the Auditor, in surcharging them. For the large sum in their hands from May, 1893, to the date of filing their account, they charge themselves with no interest.

The Auditor should have, therefore, found that the exceptions were properly filed, and inasmuch as the accountants were found delinquent, and surcharged by the Auditor, he should have imposed the costs of audit, not upon the estate, but upon the accountants, who, by their acts, made the audit necessary. Through the failure of the accountants to properly discharge their duties, the costs were incurred, and by them said costs must be paid. The first, ninth and tenth exceptions are sustained.

The Auditor has found that the accountants deposited the moneys of the estate in the Hanover Savings Fund Society Bank; that they had on deposit in said bank, on December, 1896, $11,987.39; on May 2, 1893, $1,514.12; on May 25, 1894, $4,237.74; on April 23, 1895, $8;592.35; on March 17, 1896, $11,069.14.

Said bank was paying on deposits, on certificate, for a year, three per cent.

The executors did not, for even one year, place these funds on deposit, at the current rate of interest. Their excuse is that they had to have the money ready for distribution on the filing and confirmation of their account, which was not filed until the 11th day of December, 1896. They contend it was not their duty to invest the moneys, and having received no interest they need not account for any. Further that the settlement was partly delayed, by the exceptant, who objected to the sale of the uncollected western securities at public sale, in Hanover. But the proposal for such public sale in order to settle the estate, was not made and objected to by the exceptant until after the holidays in the winter of 1895-1896; see notes of testimony, page 10. Therefore this objection in the year 1896, is no excuse for the delay on the part of the executors, to either distribute the moneys to the legatees, or place the same at interest, from 1893 to 1896.

The debts of the estate had been paid long before. Only one shadow of a claim, for $1000.00, regarded as entirely unfounded by the accountants, and not brought before the Auditor, on the distribution, on the balance on the first account, remained. It was not even demanded from the executors. Still $1000-, 00 with a sufficient amount for costs, could have been retained by the accountants, and the balance distributed to the legatees, as the balance on the second (real estate) account, was distributed to them.

We have not cited to us, nor have we had found any case which decides that in such case as this accountants must not be held for such interest as by ordinary mangement they could readily have obtained. The Pennsylvania cases cited on behalf of the accounants, Merkel's Est., 131 Pa. 584; Johnson's App., 11 Atl. 80, are entirely dissimilar to the case at bar. In the latter case the moneys were in the hands of the accountant three days less than one year. During a year from the granting of letters executors and administrators cannot be charged with interest. The Act of 1832 expressly exonerates them during that time.

On the other hand, in Light's App., 24 Pa. 180, Black, C. J., in the opinion, says that notwithstanding the executor denied on oath, that he had used the money at all, the Auditor's conclusion, that he was liable for interest, was very well warranted. "The accountant might have invested the funds, and ought to have done so." The following cases are to the same effect: that executors and administrators retaining funds in their hands for several years, without investing them, are liable for interest; Biles' App, 24 Pa. 335; Pennypacker's App., 41 Pa. 494; Bruner's App., 57 Pa. 46-52; Walker's Estate, 116 Pa. 419-426; Lloyd's Estate, 82 Pa. 143; Clauser's Estate, 84 Pa. 51-54; Armstrong's App., 6 W. 236.

The cases cited say simple interest is chargeable, but in view of the fact that the interest has been low, and the legal rate hard to obtain, we think that three per cent., the amount that was paid by the bank, where the funds were deposited, is a fair rate to be charged. In not taking a certificate for the amount on

hand each year until May 2, 1896, the year the account was filed, we think the executors were guilty of gross negligence, which requires that they be surcharged with interest at three per cent. on net amounts, (deducting ckecks on the fund.)

Checks for $830.00 were given to May 1, 1893; so that there was no balance in bank until May 2, 1893.

May 2, 1893, there was in bank, $1,514.11. On January 4, 1894, there was in bank $3,131.88. On May 25 1894, $4,237 74. Between these two balances it is safe to find there was a balance on May 2, 1894, of $3,131.88.

The checks for that year were for $486.19, leaving a balance of $2,645.69.

Another check was given April 23, 1895, for $344.91. This was only a few days before May 2, 1895, and as the balance on April 23, 1895, was $8,692 35, we may safely fix the sum to be invested May 2, 1894, at $2,645.69.

The balance April 23, 1895, was $8,692.35, and August 12, 1895, $9,269.55 Between these two sums, after deducting check of April 23, 1895, for $344.91, it is safe to fix the lesser balance for investment May 2, 1895, at $8,347.44.

May 2, 1896 about $11,000 00 remained on deposit, but as the accountant contemplated the filing of their final account, and did file it December 11, 1896, they were not required to take a certificate for another year. The money was likely to be required for distribution. The accountants are not, therefore, charged with interest for the last year.

And now, January 21, 1897, the Auditor's Report is set aside on the first, ninth, tenth and sixteenth exceptions, and the accountants are ordered to pay the costs of audit. They are further surcharged with the sum of $375.21 interest on balances in bank, over and above checks on fund during the respective years—on May 2, 1893, 1894 and 1895; and the balance on the account is fixed at $9,617.80, made up as follows:

Balance on account as filed,	$9,001.36
Surcharged by Court on commissions,	200.00
Surcharge by the Auditor,	41.23
Surcharge of interest,	375.21
	$9,617.80

COMMON PLEAS.

Quickel's Assigned Estate.

Judgment— Commissions— Interest— Mechanics' lien.

Before the Auditor exceptants contested the allowance of attorney's commissions and interest on the judgments because, though both items were included in the body of the bond and in the amount of the judgments as entered, yet the warrant to confess judgment failed to mention interest and commissions. The Auditor awarded to the judgment creditor the full amount. HELD, on exceptions filed, that the report must be sustained.

Subsequent creditors can not attack a judgment because the debtor has been over-reached. Only in case of payment, or collusion between the parties, have subsequent creditors any standing to impeach a judgment.

A mechanics' lien creditor, having failed to file his lien within six months after the last materials have been furnished, cannot participate with other mechanics' lien creditors in the distribution of the fund.

Exceptions to Auditor's report.

The report of the Auditor, Geo. W. Heiges, Esq., is in part as follows:

Before making distribution, it is the duty of your auditor to settle exceptions to the account. The exceptions filed are to but one item, viz: a credit item stated as follows: "Apl. 1, 1897. by cash paid West End B. & L. Assn. Judgments No. 366 Jany. T. 1896 & No. 1762 Jany. T. 1896 &c ,$2551 60," the exceptions being grounded on the allegation that there was more paid on these judgments than was legally due and collectible on the same as against subsequent lien creditors. The two judgments referred to in said item of the account are the following: West End Building and Loan Association v. Wilson F. Quickel, No. 366 January Term, 1896 entered February 7th, 1896, for $1125 00; and West End Building and Loan Association v. Wilson F. Quickel, et al., No. 1762 January Term, 1896, entered April 16th, 1896, for $1250.00. These judgments were entered on two building and loan association bonds signed by the defendant, in the bodies of which are contained agreements to pay five per cent. for attorney's commissions in case the real estate bound by the judgments entered on the bonds should be assigned for the benefit of creditors and the association required to look to the proceeds of the sale for the amount due on the judgments. The clause of the bonds

containing the warrant of attorney to enter judgment makes no reference to attorney's commissions nor interest, but merely authorizes the entry of judgment "for the above amount," referring to the respective amounts mentioned in the bonds. In both cases, however, judgments were entered with five per cent. attorney's commission in the usual form, and so marked on the index.

The exceptants contended that, as the warrants of attorney in themselves contained no express authority to enter judgment with interest and attorney commissions, the plaintiff could not recover more than the amounts of the judgments, to wit: $1125 00 and $1250.00, that these amounts could not be increased or exceeded by the addition of interest or attorney's commissions to the principal debt.

The testimony of George E. Neff, Esq., who was sworn on behalf of the accountant, shows, and your auditor finds, that the sum of $2551.60 mentioned in said item of the account was paid on the said two judgments against the assignor, and consisted of $2375.00 debt, $55.00 interest and $121.50 attorney's commissions.

This payment was made in the distribution of the balance on the proceeds of the sale of the real estate on which these judgments were liens, and the exceptions must be treated as if the Building Association were now before the auditor claiming $2551.60 and the exceptants objecting. No one denied that these two judgments were prior to all other liens.

At first thought it would seem that, as the clause of the bond which authorizes the entry of judgment contains no mention of the attorney's commissions and interest, the plaintiff could not recover attorney's commissions and interest if the commissions and interest added to the debt would exceed the amounts for which judgments were entered; but if it will be remembered that the judgments were entered with the attorney's commissions in the usual form, it will be seen at once that the exceptants have no standing to object to what was paid on these judgments as attorney's commissions. Even if it was error to enter the judgments with the attorney's commissions, subsequent lien creditors can not prevent the plaintiff's receiving the commissions. The distribution must be made in accordance with the judgments as entered, whether entered correctly or erroneously; Mehaffy's Appeal, 7 W. & S. 200. A subsequent lien creditor can not attack a judgment on the ground that it was improperly entered, or that it is a fraud on the debtor; Meckley's Appeal, 102 Pa. 542, and authorities there cited; as long as the defendant submits no one else can complain; Drexel's Appeal, 6 Pa. 274.

Interest is incident to every judgment. This has been long conclusively settled in Pennsylvania. A judgment is entered "with interest" only when it is intended to have interest run from a date prior or subsequent to the date of entry.

Your auditor, therefore, allows the credit to which exceptions were filed, and proceeds to make distribution of the balance as stated by the accountants.

The balance on the account is insufficient to pay all the liens, therefore, there will be nothing for general creditors. None of the various small claims above mentioned were accompanied with such particulars as to satisfy your auditor that any of them were entitled to a preference, or to share with the lien creditors, and they are, therefore, not allowed to participate in the distribution.

It was agreed by all appearing before your auditor that all mechanics' liens filed should be treated as if they had been properly proven, and all the mechanics' liens filed are therefore allowed.

Liens Nos. 253, 255 and 256, above mentioned, were for labor, and were filed for the same claim mentioned in mechanics' liens filed by the same respective parties. It was agreed that labor liens should be disallowed, and the mechanics' lien allowed, which is done.

The mechanics' liens were filed against but one of the four tracts of land the proceeds of which enter into the balance for distribution. The judgments of the West End B. and L. Association, above mentioned were liens on all the tracts. The judgment of Geo. H. Wolf's sons v. W. F. Quickel, No. 787 April Term, 1896, for $149.41, entered July 31st, 1896, was a lien on all the tracts; but was subsequent to the time when the mechanics' liens attached to the building against which the latter were filed. Cochran & Williams, Esqs., attorneys for Geo. H. Wolf's Sons, contended that as the judg-

ments of the West End B. and L. Association did not consume all the proceeds of all the tracts on which they were liens, the amount due on these judgments should be drawn in equal proportion from the several tracts on which they were liens, so as to leave a proportionate balance of the proceeds of each of the several tracts, and that the proportionate balance on the tracts against which the mechanics' liens were not filed be awarded to the judgments entered after the mechanics' liens attached, the first in order of these being that of Geo. H. Wolf's Sons, and that the mechanics' lien creditors be awarded only the proportionate balance on the tract against which their liens were filed. This can not be done. The judgments that were liens on all the properties prior to the mechanics' liens must be paid out of the real estate on which the mechanics' liens were not liens, so as to enure to the benefit of the mechanics' lien creditors; Kendig v. Landis, 135 Pa. 612. The balance being insufficient to pay all the mechanics' liens, and being less than the amount realized on the tract against which the mechanics' liens were filed, is awarded to the mechanics' lien creditors.

Billmeyer & Small Company claim the sum of $958 60 for materials and labor furnished to the building against which all the mechanics' liens were filed, and claimed to share in the distribution as mechanics' lien creditors. The testimony offered in support of this claim shows, and the auditor finds, that Billmeyer & Small Co., furnished between July 20th, 1896, and September 24th, 1896, both days included, material and labor of the value of $958.60 to said building, upon the faith and credit of the same, to be used at, in and about the construction thereof, and for which they had the right to file a mechanics' lien. It was claimed that the property was sold within the time in which a lien might have been filed, and, therefore, the claimants entitled to share in the distribution as if the property had actually been converted within the time that a lien might have been filed, or within six months after the last materials were furnished, this claim would have to be allowed in like manner as if a lien had been filed; Yardsley v. Flanigen, 22 Pa. 491. But this is not the case. The sale was held November 24th, 1896, and confirmed nisi November 30th, 1896, being within the six months; but the sale was not confirmed absolutely until March 26th, 1897, six months and two days after the last materials were furnished to the building, or two days after the time within which a lien might have been filed. The conversion and the transfer of the lien from the land to the proceeds thereof does not take place until the final confirmation of an assignee s sale. He who has no lien when the sale is absolutely confirmed, cannot participate in the distribution as a lien creditor. If a lien expires after the sale and before the final confirmation thereof it loses its right as a lien and takes the standing in the distribution of a common debt; Appeal of Jordan and Potter, 107 Pa. 83, and authorities there cited. The lien for those materials, &c., which attached when they were furnished expired six months after the last were furnished, and the lien not having been kept alive by filing a lien within six months, as required by law until the final confirmation, the claimants lost their right as mechanics' lien creditors, and your auditor, therefore, refuses to allow this claim to participate with mechanics' lien creditors in the distribution, and treats this claim as a common indebtedness. This is the harsh ruling, under the circumstances and is reluctantly made, but the auditor is constrained thereto by the law governing the case.

To this report exceptions were filed by I. Frey & Co., and Wm. R. Hess, and the Bilmeyer & Small Company.

Jere Black for I. Frey & Co.
Horace Keesey for Wm. R. Hess.
Niles & Neff for Bilmeyer & Small Co.
W. A. Miller for report.

January 21, 1898. BITTENGER, P. J. —It appears from the testimony that the assignees paid on judgments No. 366 January Term, 1896, and 1762 to the same term, to the plaintiff in said judgments, The West End Building and Loan Association, out of the proceeds of real estate in their hands, the sum of $2551.60, consisting of $2375.00 debt, $55.00 interest and $121.50 attorney's commissions. The assignee took credit for said payment in the account. I. Frey & Co., and W. R. Hess, Mechanic Lien Creditors, excepted to the said credit in the account for said payment, their contention

the admission of which, defendants excepted at the trial of said case.

Defendant reserves the right to file adbeing that as no mention of interest and attorney's commissions were included in the warranty to confess judgment, the inclusion of said amounts in the judgments, as entered, was erroneous and the same should have been deducted by the assignee for the benefit of the subsequent lien creditors.

The auditor properly rules that if the moneys paid on these first liens had been brought into Court and distributed, the judgment would have been conclusive on the auditor. All the cases say that the mere fact that the debtor has been overreached and a fraud perpetrated upon him by the creditor gives no right to the other creditors to attack the judgment collaterally. So long as it stands as a valid judgment against the defendant, it is good against them. They have no right to complain of a fraud upon him. In such case the only person who can impeach the judgment is the defendant himself, and this must be done by a motion in the proper Court to open it; Appeal of the Second National Bank of Titusville, 85 Pa. 528. The exceptions are, that payment may be shown; or that when the judgment has been fraudulently given by collusion between the debtor and the plaintiff in such judgment, for the purpose of hindering and delaying creditors, it may be attacked collaterally by the creditors intended to be defrauded. As to them such judgment is void. But they can only have it set aside as to themselves. They cannot impair it as between the parties; Dougherty's Estate, 9 W. & S. 189; Lewis v. Rogers, 16 Pa. 18. Creditors can only interfere for fraud or collusion against them; Woods v. Irwin, 141 Pa. 295. The case of Stewart's Appeal, 150 Pa. 506, expressly rules the question of commissions against the exceptants. They are not purchasers for value, and if they were they had ample notice of lien for principal, interest and attorney's commissions.

This exception assigning error in the auditor dismissing these exceptions to the account, is therefore invalid and must be dismissed.

The exception filed by the Billmeyer & Small Company to the auditor's disallowance of their claim to participate in the distribution, cannot be sustained. As is clearly shown by the auditor, the right of this exceptant to file a mechanics' lien, expired before the absolute confirmation of the sale. Having no right to file a lien at that time, the six months allowed for filing a lien, after the last materials furnished by the exceptant, having expired, they had no right to participate in the distribution of the fund, with the other Mechanic Lien creditors.

The exceptions are dismissed, and the report of the auditor is confirmed.

Adam Jacoby & Bro. v. West Chester Fire Insurance Company.

Insurance—Evidence—Non suit.

A provision of the policy was that it shall be void, "if the subject of insurance be personal property and be, or become encumbered by a chattel mortgage." In the adjustment plaintiff swore that there were no encumbrances; whereas in fact there were liens on the real estate. HELD, that the clause applied only to personal property, on which there could be no encumbrances in Pennsylvania.

Plaintiff proved policy, and the admission of an adjustment in the affidavit of defence, and rested. Defendant asked for a non-suit, on the ground that the furnishing of proof of loss and an adjustment had not been proven. HELD, that the refusal to grant such non-suit was no cause for a new trial.

The rejection of evidence, if the same was afterward admitted under another offer, is no cause for new trial.

Rule for new trial.

The reasons for a new trial were as follows:

Defendant by its counsel, N. M Wanner, Esq., respectfully moves the Court in arrest of judgment and for a new trial in said case. and in support of its said motion assigns the following reasons:

The verdict was against the evidence and against the weight of the evidence.

The Court erred in refusing the defendant's second and third points.

The Court erred in affirming the plaintiff's points.

The Court erred in rejecting certain evidence offered on the part of the defendant and against defendant's exception, at the trial of said case.

The Court erred in admitting certain evidence offered by the plaintiffs and to

ditional reasons and to specify more particularly the admissions and rejections of evidence above referred to after the stenographer's notes shall have been filed of record in said case.

The ruling of the Court specifically alleged, in the reasons for a new trial, to have been erroneous, are found in the following extracts from the notes of testimony:

On page 6.

After plaintiff had proved policy and the adjustment, they rested. Whereupon defendant moved for a non-suit for the following reasons:

Because the plaintiffs have not made out such a case as entitles them to recover.

Because they have not offered by competent, legal evidence to show an adjustment of the loss, or the amount properly chargeable to this company in this policy.

Because they have not shown that these plaintiffs furnished this company with any proofs of loss, as required by the policy.

Because the policy offered contains attached to it ann unexplained a receipt by the plaintiffs of a draft for $446.01 in full settlement of all loss and damage by fire on June 15, 1897, of the property insured by the policy in suit, said receipt further stating that the policy is thereby cancelled.

On page 77.

Defendant (through Mr. Wanner) proposes to show by the witness on the stand that Mr. Babcock only represented one company at that time, which was the Springfield Insurance Company. That this was one of the three companies that were protected from payment by the assignment of Jacoby & Brother to Elmer Ziegler. We propose to show that that was the reason given by Mr. Babcock for refusing to have anything to do with it. We propose to show further by the witness that no payment has been made yet by that company on that policy. For the purpose of eliciting the whole of this matter, which has been in part developed under cross-examination.

The Court. I think he stated all of that a moment ago excepting this latter part. The mere fact that they are not paid I do not think is evidence.

Mr. Niles. We object to that particularly.

Q.—(By Mr. Wanner.) Do you know whether or not the Springfield policy has been paid?

Objected to (by Mr. Niles) as entirely irrelevant; not evidence at all for any purpose for the defendant in defense, or in any manner.

The Court. We do not think it is evidence. We reject this offer, and seal an exception for the defendant.

On page 81.

Defendant (through Mr. Wanner) proposes to prove by the witness on the stand that Elmer C. Ziegler, who was the local agent of the Springfield Fire and Marine Insurance Company, and at whose request the witness adjusted the loss of that company, gave him no information whatever as to the facts which he had learned from Robbins, permitting him and the other adjusters to adjust this loss, and to agree upon the amount that should be paid, withholding from them all knowledge of the charges against the Jacobys. To be followed further by evidence from the same witness that after the adjustment Mr. Ziegler explained to him that the reason he did not tell what he knew at the adjustment, or before, was that he had agreed with the Jacobys not to let the adjusters know about these things, so that the charges made against the Jacobys would not come out against them.

This in connection with the testimony already given, to show fraud on the part of the Jacobys and Mr. Ziegler jointly in the concealment of these facts, and in the procurement of the adjustment of the loss under these policies.

Objected to (by Mr. Niles) as not proper legal evidence for the purpose offered, nor for any purpose for the defendant in this case; that the statements of Mr. Ziegler to the wirness, in the absence of the plaintiffs, can have no bearing to affect them.

The Court. I do not think it is evidence. We reject the offer, and seal an exception for the defendant.

On page 97.

Defendant (through ex-Judge Latimer) proposes to prove that on Saturday before the fire the witness went to the factory after it had closed, and after working hours; that he made an effort to get in this same door that he has already tes-

tified about, with a latch key, and that the door was fastened on the inside, and he was unable to get in; that he went down to Hamilton Avenue, and put his hand in a broken pane of glass, and unfastened the door down there, and in that way got into the factory; that he discovered a pile of kindling, which he had in the engine room piled up,—a large portion of it removed and carried off;—that on Monday morning when he went there he found that the kindling wood had been replaced; that he noticed on Saturday night the same smell of turpentine, but thought it was done by filtering rags, and did not investigate To be fol lowed by evidence of another witness, that I cannot name now, that Adam Jacoby said that he had been in that shop on Sunday, the day before the fire, and between the Saturday night and the Monday on which the fire occurred. As a circumstance showing or tending to show the fraudulent burning of this property on the part of Jacoby.

Objected to (by Mr. Niles) as not proper legal evidence for the purposes offered, or for any purpose for the defendant in this case; as not showing or tending to show either that the building was set on fire, or that it was set on fire by the procurement of the plaintiffs, or either of them; that it is entirely irrelevant and immaterial.

The Court. What night do I understand the fire was?

Mr. Niles. The fire was on Monday night.

The Court. And this was on Saturday night preceding. I do not think it is evidence.

The Court. I do not think this particular offer is evidence in the case. We reject the offer, and seal an exception for the defendant. If this was Monday night, and shortly before the fire, it would be in a different position.

On page 165.

Plaintiff's counsel(Mr. Niles) proposes to prove that at the time the first insurance was taken in January, it was taken at the solicitation of Wilson S. Owens and his brother, insurance agents, and Elmer C. Ziegler, and Ramsay & Small; who came to the shop of the plaintiffs and asked them to allow them to insure their property; that in April, B. F. Frick, another insurance agent saw the witness twice,—met him on the street once, and came to his shop once,—both times asking him to give him some insurance; and at his earnest solicitation he allowed him to increase the insurance by $3,000; and that in May, Wilson S. Owen, or Owen & Brother, one of them, insurance agents, came to him and earnestly urged him to insure his property more, stating that it was under insured, and that it ought to be larger for his large building, in case of fire; and at their solicitation he allowed $2,000 more to be placed upon the property.

For the purpose of sustaining the issue on the part of the plaintiffs in rebuttal, and in response to the introduction of the policies, and the fact by the defendant in defense for the purpose of showing fraud. And for the purpose of rebutting that allegation of fraud made by the defense.

Objected to (by Mr. Wanner) that the only material question is whether or not there was an over-insurance, or an increase of insurance to such an amount as was excessive; and that any evidence as to asking the witness to take out the insurance is entirely immaterial and irrelevant.

The Court. We will admit the offer, and seal an exception for the defendant.

N. M. Wanner for motion.

Niles & Neff and *Horace Keesey*, contra.

February 28, 1898. BITTENGER, P. J. —The first and second reasons are not sustainable. The case was largely one involving matters of fact, exclusively, for the jury. The testimony was very conflicting. We cannot say that their conclusions are against the evidence or its weight.

The fourth and fifth reasons are too general to deserve consideration. The right was reserved to file additional reasons and specify more particularly, the admission and rejection of evidence complained of, but the right was never exercised.

At the argument, counsel for the rule referred to several rulings, but in many cases, the rulings of the Court were upon the order of the evidence, a matter entirely in the discretion of the court. In others, although not required to consider them on account of the generality of the reasons filed, we have examined the record and find that evidence upon the

matters complained of was afterwards admitted, as in the matter of the Sanborn Map and the non payment of the policies covering $3,000.00, assigned to Elmer C. Ziegler.

We have failed to discover any error in the rulings of the Court called to our attention on pages 6, 77, 81, 97 and 165. The first, fourth and fifth reasons are therefore overulled.

This leaves for consideration the second and third reasons, viz: the answers of the Court, affirming the plaintiff's points, and the refusal of the defendant's second and third points.

Those points of defendant involved the right of plaintiff to recover, when it appeared from the evidence that Adam Jacoby stated in the proof of loss that there was no encumbrances on the property, whereas in fact there were judgment liens against the real estate of $4,500.00.

We instructed the jury, in the general charge, that the only encumbrance provided against in the policy was liens against the personal property insured; in one of the conditions; and such is the case.

The provision against encumbrances is in the second condition, in which it is provided that the policy shall be void "if the subject of insurance be personal property and be, or become encumbered by a chattel mortgage."

There is no clause in the policy against encumbrances on the real estate. Hence the first condition that "any false swearing touching any matter relating to this insurance or the subject thereof, whether before or after loss" shall render the policy void, does not apply, or affect the right of the plaintiff to recover. The lien provided against is a chattel mortgage only. Such a thing is not known in Pennsylvania, and, of course, none could be proven. The provision against liens on real estate would be vain and unnecessary, since the company could not be injuriously affected by them, and there is no such prohibition in the policy.

The instructions of the Court and its answers to the points referred to were therefore, strictly right.

We have carefully considered this application, and not having discovered any error, from which the plaintiff suffered, must discharge the rule, and overrule the motion for a new trial.

It is so ordered.

Grove's Application.

School Law—Proximity of school houses—Districts.

Petitioner resides in East Hopewell township, about two miles from the nearest school house in his own township and one and one-half miles from a school house in another township. As the latter school was nearer and along a better and more frequently travelled road, he applied to the school directors of his own district to make arrangements whereby his children could be sent to the school in the other district. The directors attempted to make such arrangements by a transfer of children from the other district, but were refused, and could only have sent petitioner's children at an expense of about thirty dollars per year, which they declined to make. On petition for a rule to compel them to make such arrangement, HELD, that the rule must be discharged.

The discretion of the directors, under the act in question, is to be exercised wisely; and until it is shown that they have abused that discretion, the Court cannot interfere.

Rule to show cause, &c.

Geise & Strawbridge for petition.

Ross & Brenneman, contra.

February 28, 1898. BITTENGER, P. J. —This rule was granted on application of J. Frank Grove on behalf of his minor children under the Act of May 8th, 1854, P. L. 617, which is as follows: "And if it shall be found that if on account of great distance from or difficulty of access to the proper school house in any district, some of the pupils thereof could be more conveniently accommodated in the schools of an adjoining district, it shall be the duty of the directors or controllers of said adjoining district to make an arrangement by which such children may be settled in the most convenient school in the adjoining district."

The application is on the ground that the petitioner resides with his children in East Hopewell township, about one half mile nearer to the Zion school in Hopewell School District, than to Bose's school, his nearest school in his own school district of East Hopewell, and on account of the road to Zion school house being less lonely and difficult of travel in the winter season for children attending school than to Bose's school house, to which the directors of East Hopewell require him to send his children. A portion of the evi-

dence tends to show that he was required by the respondents to send his children to Sechrist's school house, still considerably further than Bose's school house, but we are assured he may have his choice of either of the two nearest East Hopewell school houses. Bose's is the nearer and more convenient of the two.

The petitioner resides in the southwest corner of East Hopewell township a distance of about two miles from Bose's, the nearest school in his school district. The road is comparatively lonely, as is proven; but two families live on that road between the residence of the petitioner and Bose's school house who would be company for the petitioner's children over the most lonely part of the road. Several of the children of the petitioner are well grown, from thirteen down, the two older being boys who should be capable of protecting their younger brother and sisters.

The distance to be travelled by these children to school in their proper school district is certainly too far for comfort and convenience, and the road is not desirable for school children. The inconvenience and hardship arise, however, from their residence, near the township line, away from the established schools.

While we should be pleased to afford the petitioner's children the relief sought, in improved facilities to attend school, we cannot say that we are satisfied from the evidence, that the directors of East Hopewell have abused their discretion under the Act of Assembly above quoted. They attempted to make a satisfactory arrangement with the directors of Hopewell, by the exchange of a family of children desiring to attend school in East Hopewell, but were refused. The directors say that if relief is extended to the children of Mr. Grove, that the district will suffer pecuniary disadvantages in requiring the directors to make similar arrangement for other children, residing near the line of their school district. It is also averred in the answer, and not denied, that the respondents paid about thirty dollars for the attendance of petitioner's children at Zion school in 1896.

The discretion of the directors, under the act in question, is to be exercised wisely; and until it is shown that they have abused that discretion, the Court cannot interfere. The case of Freeman v. The School Directors of Franklin township, 37 Pa. 385, and other cases rule this case. We are without power to interfere, and do not think, under the circumstances proven, we should, if we had the power. It would be setting a precedent unsettling and greatly embarrasing the action of the authorities of the several school districts of the county, doubtless in many cases entailing hardship upon the tax payers of the different school districts.

The petition is dismissed and rule discharged at the cost of the petitioner.

Loucks v. Lightner.

New trial—Juror—Mistake in name—After discovered evidence.

A member of the County Committee told John C. Garner that he had handed in his name to be put in the jury wheel; the name drawn from the wheel was John C. Gaines, and notice thereof was sent to him through the mail; the notice was received by Garner, as his name was frequently mis-spelled; he signed the return card as Gaines, and attended Court and answered to the name of Gaines and as such served on the jury trying this case; there was no person by the name of Gaines resident in the township. HELD, not to constitute ground for a new trial.

After discovered evidence which is cumulative only of what was attempted to be proved on the trial by much stronger and more direct evidence, is not ground for a new trial.

Rule for a new trial.

Cochran & Williams for motion.

Gemmill & Ammon, contra.

February 21st, 1898 —STEWART, J.— I am so well satisfied with the result of the trial of this case that I hesitated about granting this rule. As it went to the jury it was purely a question of fact depending on the credibility of witnesses. They found for the defendant, and I am not convinced of any error in my rulings on the trial or in the charge to the jury.

The plaintiff, among other reasons assigned for a new trial, alleges the following:

1st. John C. Gaines, whose name appears among the jurors trying said case, was not a member of said jury.

2nd. John C. Garner, acted in the place of said John C. Gaines and answered to the name of John C. Gaines.

3rd. The said John C. Garner was not summoned by the Sheriff of said county to serve as a juror during the term of Court at which said case was tried, nor was his name on the list of jurors.

4th. The said John C. Garner in a written communication to said Sheriff, improperly and falsely used and signed the name of said John C. Gaines, thereby inducing said Sheriff to believe that said John C. Gaines had been summoned to serve as a juror aforesaid.

The plaintiff further avers that he only learned the above facts this 8th day of December, A. D. 1897, and that he had no knowledge of said facts during the trial of said case.

Depositions were taken in support of these reasons and to show that John C. Garner impersonated John C. Gaines on the jury which tried the case. This evidence shows that the name of John C. Gaines, Farmer, York Township, was drawn from the jury wheel, and notice sent by letter to his P. O. address by the Sheriff which letter enclosed a return postal card; that the letter was delivered by the Post Master to John C. Garner, who testified that his name is frequently mis-spelled; that he took out and signed the return card by the name John C. Gaines and mailed it to the Sheriff; that he attended Court and answered to the name of John C. Gaines, that there is no person by the name of John C. Gaines in the township and that he was informed by one of the Committee-men that he had handed his name to the Jury Commissioner and that "the committeeman said he put so many names in and mine was among them." From this evidence it seems plain to my mind that John C. Garner was the person who was intended when the name John C. Gaines was put in the jury wheel and that when he received the notice it was received by the person for whom it was intended, and that the only error was in the name and not in the person. Had there been a John C. Gaines in the township a very different view might be taken of the matter, but upon the evidence as it stands I am satisfied that John C. Garner is the person selected, drawn and who in fact served as a juror and therefore this is no ground for a new trial. This position is sustained by the cases of Eshelman v. Miller, 3 Lancaster L. Rep. 57; Comth. v. Valsalka, 181 Pa. 17.

The after discovered evidence submitted as ground for a new trial it does not seem to me, falls within the rules on that subject. It is to put it in its strongest light cumulative only of what was attempted to be proven on the trial by much stronger and more direct evidence. At the trial the plaintiff undertook to show as the origin of the consideration for the note sued on an indebtedness of Samuel Lightner, deceased, father of the defendant, due at his death to George Lightner his brother, evidenced by a note. George Lightner who was called, testified to this fact and was supported in it by Charles Lightner, a brother of both George and the decedent, who was entirely disinterested. George testified that after the death of Samuel, his widow gave to him a note for $800, which was in lieu of the $600 note which he held against Samuel and a note of $200 which Samuel owed to his aunt at the time of his death, and which George paid and took up. The widow who was called, denied in toto all knowledge of any such indebtedness, and the giving of any note for it and the whole transaction. It is not proposed to contradict her about this matter that the after discovered evidence is offered, but to prove that Harry G. Lightner, the defendant, who was a mere boy when his father died, said about the time of bringing the suit, "that his father had owed his uncle George a note and when he died his mother gave a note, but that he never gave a note." As to his mother having given George a note it was a matter which was very probably only hearsay, even if Harry did not deny the statement, and it was positively denied by his mother and was one of the contradictions summitted to and passed upon by the jury. The testimony of this witness, Jacob Rutter, as well as that of the other witnesses called, in support of the after discovered evidence, is by no means clear or satisfactory. It is not such evidence as would create much or any impression on the mind of a jury and would be lost sight of in the sharp conflict of assertion and denial detailed by the main witnesses on the trial. It is not such evidence as would be likely to lead to a different result if submitted with the other testimony to another jury, and therefore is not

within one of the principal rules upon which after discovered evidence may be successfully made the ground for a new trial.

The rule for a new trial is therefore discharged and judgment is directed to be entered on the verdict upon payment of the jury fee.

ORPHANS' COURT.

Hoshour's Estate.

Interest—Accountant—Compensation.

The Auditor having charged the accountant with interest on the whole estate, very properly allowed interest on what was paid out of the *corpus* of the fund for maintenance.

Interest will not be charged on balance on account during the pendency of exceptions unless the exceptions are filed by the accountant or at his instance.

Where an audit is rendered necessary by the carelessness of the accountant in not keeping an account, the expenses of the audit are properly placed upon him.

But in the absence of any proof of fraud or dishonesty, or that any part of the fund was used in the accountant's business or lost or exposed to danger, the commission should not be disallowed.

Exceptions to Auditor's report.

The Auditor's report is in substance as follows:

The facts agreed by counsel are, that the ward, Daisy L. Ogden (now Hoshour) was born November 25th, 1875; Charles W. Ogden, her father, died May 7, 1883; Charles Lafean, maternal grandfather of the ward, was appointed her guardian by the Orphans' Court of York county; Mary J. Ogden, the widow of Charles W. Ogden and mother of Daisy Hoshour, by her second marriage became on September 11th, 1884, the wife of Frank Wheeler and died on October 12th, 1893; that on December 17th, 1888, on petition of Mary J. Wheeler, mother of the ward the Orphans' Court of York county granted an order of allowance out of the ward's estate for maintenance, education, &c.; that Charles Lafean, the guardian, died on the first day of May, 1894; that Daisy L. Ogden (now Hoshour) attained the age of twenty-one years November 25th, 1896, and A. H. Lafean and D. F. Lafean, executors of the last will of Charles Lafean, deceased, the guardian, exhibited into the office of the Register of Wills of York county the final account of their testator's management of his ward's estate, to which account, after presentation to your Honorable Court, exceptions were filed on behalf of the ward.

From this it will be seen that the mother of the exceptant avers that she "has been obliged to depend entirely upon the guardian of said minor children, to wit: Charles Lafean (petitioner's father) for said minor's maintenance, education and medical attendance, and prays the Court to make an order of allowance of one dollar per week for the maintenance of each of said minors to begin immediately after the decease of her late husband, and to continue until said minors shall arrive at the age of fourteen years respectively, or the further order of this Court; and further order and decree that Charles Lafean guardian as aforesaid, shall be entitled to a credit for the amount of said allowance paid by him in his account of his said guardianship of the respective estates of said minors, &c."

On which the Court decreed the "order of allowance granted as prayed for."

Here is authority from the Court to make a payment and it is conclusive upon your Auditor to the extent to which it was actually made pursuant thereto.

How much was paid by the guardian? The accountants called Frank Wheeler who testifies that in September, 1885, he received from Charles Lafean the sum of $550.00 for maintenance, education and medical attendance of this exceptant and her sister (the latter having the same guardian) that it was paid by check and that he gave no receipt for it.

For the purpose of affecting the credibility of this witness the exceptant produced a letter which he admitted writing to the exceptant. The statements in this letter do not correspond with the testimony of the witness, but your Auditor cannot regard the witness unworthy of belief merely upon this discrepancy and finds that the guardian did pay Frank Wheeler the sum of $550.00 in September, 1885, for the support, &c., of these two minors. It was manifestly a payment without authority of the Court and unjustifiable out of an estate of as small an amount as this ward's was. While "it is a rule of equity that if a fiduciary does without application what the Court would have approved on application, he

shall not be called to account and forced to undo it;" Potts' Petition, 1 Ashmead 340, yet we doubt if the Court would have authorized or decreed in September, 1885, the present payment of the sum of $275.00 out of this ward's estate of $400.00 for the then past support, education and medical attendance of the ward from the death of her fatner in May, 1883, nor would the guardian have been justified in advancing money to such an amount for such purpose for future support and maintenance.

But over three years subsequent to the time the payment of $275 00 was made the mother of the ward presents to the Orphans' Court a petition as above set forth.

The payment of $275.00 was clearly not made pursuant to this decree but your Auditor is of the opinion that the guardian is entitled to a credit in the account not for the sum of $275.00 as of September, 1885, but of one dollar per week from May 7th, 1883, until the payments aggregate the sum of $275.00, or in other words for two hundred and seventy-five weeks, said payments bearing interest. Your Auditor so finds and sustains the third exception to the extent of the difference between the amount for which the credit is taken in the account and the $275.00 with interest.

The fifth and last exception is based upon the ground that the accountant mingled the ward's money with his own and used it for his own purposes not investing it separately or even marking it, and therefore is not entitled to any compensation. The argument of the counsel for exceptant that the character of the account filed and errors therein, are elements which enter into the question of the guardian's right to compensation would be of more weight, were this account filed by the guardian himself, but it must be borne in mind that the guardian did not state this account; he is dead and his executors guided by such light as they could gather from his effects stated the account for their testator. Three sons of the guardian (two of them being the executors) and his widow were called as witnesses and from their testimony no account or even memorandum touching this ward's estate was kept by her guardian, appears to exist and we must conclude, therefore, that none was kept by the guardian, and while the omission to keep such account or even personal use of the ward's estate by the guardian clearly renders the accountant liable for interest (which is not disputed by the accountant's legal representatives) yet it also shows a neglect and want of proper attention to the details of the trust.

The principal of "omnia presumuntur rite esse acta" was urged by counsel for the accountant and that the burden is upon the exceptant to show that the fund was separately invested, but your Auditor cannot so view the question and is of the opinion and concludes that the exception touches the credit item of compensation and it became the duty of the accountant to prove proper attention and performance of duty by the guardian, by the separate investment of the fund or at least an account thereof showing some attention thereto; and in the absence of such evidence the fair inference is, that it was not so invested but used as the individual money of the guardian, and your Auditor regards this position as sustained by Patterson v. Nicoll, 6 W. 379.

In the absence therefore, of any affirmative evidence touching the investment of the fund or inferable from some account or memorandum of the guardian, we conclude and find that the guardian used the estate as his own, mingling it therewith, not with any idea of unfair dealing with his ward, but purely through lack of instruction and want of knowledge as to his duties touching the trust, and under the authority particularly Selleck's Appeal, 16 W. N. C. 370, a case very similar in many respects to this, we must refuse the compensation and sustain the fifth exception.

Niles & Neff for accountant..

C. Henry Schambach for Daisy Hoshour.

February 28th, 1898. BITTENGER, P. J.—Of the exceptions filed on behalf of the estate of Daisy Hoshour, the third, to the fee of the counsel for the accountant, is not insisted upon, doubtless for the reason that it is a reasonable fee.

The first and second of the same exceptions, to the non allowance of interest during the pendency of exceptions to the account, cannot be sustained. Accountants in such circumstances are not liable for interest

The Auditor finds that $275.00 was

paid by the accountant, according to the testimony, and allows interest on the same because he charged the accountant with interest on the whole estate As the payment of maintenance was out of the *corpus* of the fund, the allowance of interest was entirely correct. The restatement of the account with the item of payment of allowance and interest on same is entirely proper, and these credits cannot be disturbed.

For the reasons stated, the exceptions filed on behalf of Daisy Hoshour are dismissed.

The exceptions filed on behalf of the accountant's estate, two in number, are first, as to disallowance to him, of commissions; second, as to charging the accountant with expenses of the audit.

The law governing, in the matters involved in these exceptions, is clearly laid down in the case of Miller's Estate, 16 W. N. C. 115, by Judge Hanna, as follows: "To care for the property of others, as has been said, is often a thankless task, and kind offices are requitted with forgetfulness and ingratitude. The duty, however, is voluntarily assumed, and, when performed with fidelity and care, is deemed worthy of compensation and re compense. But, if the contrary appear, then not only is reward withheld, but personal liability for loss incurred. While such is the rule, the circumstances of each case are to be considered in its application, and many exceptions are to be found. It may be stated as a general principle that a trustee who with integrity accounts for all moneys or other assets of his trust, has fairly earned the usual compensation allowed for the services performed and the responsibility incurred. And he is not to be deprived of it merely from the fact that through his forgetfulness or neglect to file an account during a series of years, the loss of vouchers, or an inaccurate or faulty book of entries kept by him, he occasions himself and the parties interested expense and delay in the preparation and settlement of his account. When this result follows, then, according to every principle of equity, the trustee should contribute toward, if not wholly pay, the costs and expenses incurred through his neglect and omission; Wistar's Appeal, 4 P. F. Smith 60. But it should be a flagrant case to cause a forfeiture of all compensation. There must be evidence of gross negligence, fraud and bad faith, even where he has been surcharged in his account; Price's Estate, 31 P. F. Smith 263. See, also, Holman's Appeal, 12 Harris 174; Norris's Appeal, 21 P. F. Smith 106; Milligan's Appeal, 1 Out. 533; Williamson's Estate, 7 Weekly Notes 82; Nelson's Estate, 12 Ib. 440, and Quinn's Estate, 40 Leg. Int. 120; Brennan's Estate, 15 P. S. Smith 16, where it is held that only the faithless trustees are to be punished with a loss of commissions."

While the Auditor has found, in the case before us, that the moneys of the trust were not kept separately invested (on questionable testimony) and that proper accounts of the administration of the trust were not kept by the accountant, he finds that there was no fraud or dishonesty.

By the carelessness of the accountant in not keeping an account, as required by law, the audit was made necessary and the Auditor has properly charged his estate with the costs of audit.

The second exception, filed on behalf of the accountant's estate, is accordingly dismissed.

We think, however, that the Auditor dealt harshly with the accountant in refusing him any commissions. He was the maternal grandfather of his ward. The mother of the ward, Mary Wheeler, in her petition to the Court in December, 1888, for an of order maintenance, represented that she was without means, and had been obliged to depend entirely upon the guardian of her minor children, Charles Lafean, for said maintenance, education and medical attendance.

This maintenance had to be advanced to her from time to time by the guardian, and it is not strange, in these circumstances, that no separate investment could be shown to the Auditor after the lapse of many years, and his death. It is questionable if he has credit for all the moneys furnished by him for the support of his grand children, who, with their mother were dependent upon him for the matters stated in her petition to the Court.

Every dollar with interest, is accounted for, in the account as corrected by the

Auditor. It is not shown that any part of the trust fund was used in the accountant's business or lost or exposed to danger. The Auditor has found no fraud or dishonesty—only neglect and irregularity.

This is not, in our judgment, such a case as requires the disallowance of commissions to the accountant. We therefore sustain the first exception and set aside so much of the Auditor's report as disallows commissions.

As restated by the Auditor, the balance is ---------- $246.46
From this is deducted the accountant's commissions------ 28 55

Balance due the ward--- $217.91

Hoke's Estate.

Executor—Inventory—Omitted Notes.

The petition for a citation avered the execution of two notes by the executor in the lifetime of the decedent, in decedent's favor, which notes were not included in the inventory filed. Executor admitted the execution of one of the notes and his liability thereon. HELD, that executor is ordered to file supplemental appraisement, embracing all the estate omitted from former inventory, and is also ordered to pay the costs of this proceeding.

Citation.

The Court's opinion gives the facts.

February 28th, 1898. BITTENGER, P. J.—This citation was granted on a petition of Lizzie Aughenbaugh, a legatee under the will of Henry Hoke, late of the City of York, deceased.

The petition specifies two judgment notes executed by the respondent in the lifetime of Henry Hoke, and delivered to him, which she alleges were due and unpaid at his decease, neither of which was included in the inventory filed.

The answer filed admits the execution of the first note specified in the petition, dated April 1, 1896, for $1,500.00, and his liability upon the same; though the answer says said note was not found among the papers of the decedent. The execution of the other named note is denied. The evidence is conflicting and does not clearly establish any liability by the executor, on such a note.

The Acts of March 15, 1832, Purdon's Digest, 583, pl. 67, requires an executor to embrace in an inventory to be filed by him "all the goods, chattels and credits of the deceased," which inventory is to be filed by him in the Register's Office within thirty days of the time of administration granted. By the fifth and sixth section of the Acts of 24th of February, 1834, Purdon, Ibid, all bonds, notes, evidences of debt and other claims, including any against the executor, must be properly appraised and returned.

It was, therefore, the manifest duty of the respondent Jacob Hoke, as executor of the will, to include in the inventory filed the amount written in the alleged missing note for $1,500 00, for which amount he does not deny liability, with interest due.

We order a supplemental appraisement to be filed by the executor, in the Register's Office, within fifteen days from this date, embracing all the estate omitted from the inventory already filed, which is within the knowledge of the executor, and we order him to pay the costs of this proceeding.

Court of Oyer and Terminer.

Com. v. Jacoby et al.

Criminal Practice—Nolle Prosequi—Costs.

A *nolle prosequi* will not be entered without payment of costs. Officers and witnesses cannot be deprived of their proper fees in such a disposition of a criminal prosecution.

Petition to Court and District Attorney to enter *nol pros.*

District Attorney *J. R. Strawbridge* and *N. M. Wanner* for Commonwealth.

Niles & Neff and *Horace Keesey* for defendants.

February 28th, 1898 BITTENGER, P. J.—We are cognizant of the Commonwealth's case upon the above mentioned indictment, having become so from a trial of No. 17 October Term, 1897, in the Court of Common Pleas, Adam Jacoby and Samuel Jacoby v. The West Chester Fire Insurance Company of New York, upon the fire insurance policy mentioned in the petition, in which action a verdict was rendered in favor of the plaintiffs, after a long and full trial.

At the argument of this application, in the light of the development of the Commonwealth's case—in the civil suit—we expressed to Mr. Strawbridge, the District Attorney, our willingness that a *nolle prosequi* might be entered as prayed for, upon the payment of the costs, by the defendants. The counsel for the de-

fendants immediately declared that the defendants would not pay the costs.

A *nolle prosequi* will not be entered without such payment of the costs. Officers and witnesses cannot be deprived of their proper fees in such a disposition of a criminal case.

Therefore this petition is overruled, and is dismissed.

Com. v. Jacoby et al. No. 2.

Indictment—Arson—Quashing.

The indictment, charging arson, described the property destroyed as "the property of Samuel Jacoby and Adam Jacoby," the latter being one of the defendants. HELD, that as to I. Park Wogan, the other defendant, there is no reason why the indictment should be quashed.

There being nothing to show or prove that the Adam Jacoby, one of the owners of the building, is the same Adam Jacoby who is indicted, the motion to quash will be overruled.

Motion to quash.

Niles & Neff and *Horace Keesey* for motion.

District Attorney Strawbridge and *N. M. Wanner*, contra.

February 28th, 1898. BITTENGER, P. J.—In Pennsylvania it was long held that an indictment would not be quashed for any defect not appearing on the record; Commonwealth v. Church. 1 Pa. 105. This rule has been changed, and now indictments will be quashed for extrinsic matters, such as illegality or irregularity in finding of the bill by the Grand Jury. A bill sent before the Grand Jury by the District Attorney by leave of Court, cannot yet be quashed, unless for matters appearing upon its face; McCullough v. Commonwealth, 67 Pa. 30; Harrison v. Commonwealth, 123 Pa. 508.

There is no irregularity alleged in this case, but we are asked to quash it because it does not charge an indictable offence; in that it appears on its face, that the shop the accused are indicted for setting fire to is described as "the property of Samuel Jacoby and Adam Jacoby, they being the joint owners thereof."

It is contended that to sustain a conviction, the property burned must be exclusively the property of another. Several English cases were cited upon the argument to sustain this view. It must be observed that in those cases the crime charged is the burning of dwelling houses, which is primarily an offence against the persons in possession of the dwellings, and for the protection of human life; and not, as in this case, a shop and manufactory and not a dwelling place of any one.

So far as concerns I. Park Wogan, one of the defendants, nothing appears in the indictment to require the Court to quash it.

We are not clear as to the invalidity of the bill against Adam Jacoby. It does not even appear that he is the same Adam Jacoby named as joint owner of the property set on fire. Hence it is our duty to refuse to quash the bill. The Court will not quash except in a clear case; Respublica v. Cleaver et al., 4 Yeates 69. In the language of Chief Justice Gibson in that case: "It does not correspond with our idea of justice or sound discretion to interfere in the summary manner prayed for in the present instance. Without anticipating the opinion we may hereafter form on the legal question, should it become necessary, it is sufficient for us to say that this is not so clear a case, as would warrant the quashing of the indictment."

The motion to quash is overruled.

C. of O. and T. of Montgomery Co.

Com. v. Greer.

Involuntary manslaughter—Policeman—Use of firearms—Arrest.

An officer may not kill a man fleeing from arrest charged with a misdemeanor. Life can only be taken by the officer when the person to be arrested resists with force and so endangers the life or person of the official as to make such a killing necessary in self defence. An officer in his attempt to arrest a felon may use all the force necessary to apprehend him, even to the extent of taking life.

Where an attempt is made to arrest upon suspicion of a felony without a warrant, the killing of a fleeing man can not be justified without proof of his guilt.

The bad character of the accused is a proper matter for investigation before a jury where the question of self-defence arises; otherwise, not.

Under the charge of larceny the small trifling value of the goods taken may be considered by the jury where the question of felonious intent arises.

Motion and reasons for a new trial.

J. A. Strassburger for Commonwealth.

Holland & Dettra for defendant.

January 3rd, 1898. SWARTZ, P. J.—The grand jury ignored the count for voluntary manslaughter, and the defend-

ant was tried on the charge of involuntary manslaughter. The accused was a police officer in the borough of Conshohocken. On the night of July 3, 1897, the deceased. Patrick Gallagher and three others. Riley, Norton and Crocker, stood at Benz's corner, in said borough. Riley had just returned with a quart of whisky contained in two pint bottles. The four men were under the influence of liquor. Norton and Riley paid for the quart. Gallagher asked for some of the liquor. Riley remonstrated, but Norton insisted that Gallagher should have a drink. The bottle was passed, and Gallagher declared that he would keep it. Riley stepped forward to take the bottle, when he was struck a blow by Gallagher, who then ran away pursued by Norton. Just as the blow was struck the officer came around the corner, and joined in the chase. He followed the deceased for some distance and discharged his pistol. Gallagher did not stop, and the officer fired a second shot. The chase continued, and the policeman fired his third shot. Gallagher had crossed a common and ran to the Bate boiler works. When the officer overtook him he was found lying on the ground by a fence with a mortal wound made by a pistol ball entering his back near the spine and a few inches below the point of the shoulder blade.

There was no material dispute as to the facts at the trial, but the issues raised involved the inferences to be drawn from the facts.

That the officer killed the man was not denied; that he saw enough of the occurrence to justify an arrest for a violation of the law, is equally true.

Some of the important questions submitted to the jury were: What offence did Gallagher commit? Did the officer shoot at the man to stop his flight, or did he intend to fire into the air for the purpose of frightening the man and bringing him to a halt? If the intent was to shoot into the air, was the act done recklessly, carelessly, and in an unlawful manner?

An examination of our charge satisfies us that these matters were fairly referred to the jury. We think the charge was full and adequate and the jury must have understood our view of the law under the explanations we endeavored to give.

That an officer may not kill a man fleeing from arrest charged with a misdemeanor is well established; Kerr on Homicides, Sec. 10, 11, 12; Wharton on Homicide, Sec. 211, 213 Where an attempted arrest is for an ordinary misdemeanor or in civil action, life can only be taken by the officer where the person arrested resists with force and so endangers the life or person of the official as to make such killing necessary in self-defence; Kerr, pages 215, 216. In the case before us there was no resistance or force used against the officer.

There was no necessity to kill to stop riotous conduct, for the deceased fled as soon as he saw the officer, perhaps even before he knew of the officer's presence. No one was in danger of bodily harm from any one of the four men from the time the officer appeared on the scene.

It is equally clear that an officer in his attempt to arrest a felon may use all the force necessary to apprehend the man; Brooks v. Commonwealth. 61 Pa. 359. Where, however, an attempt to arrest is made upon suspicion of a felony without a warrant the killing of the fleeing man cannot be justified unless there is proof that a felony was in fact committed; Wharton on Homicide, Sec. 213.

Whether the facts in evidence justified a finding by the jury that a felony was committed by the deceased, was to our mind in doubt; but we allowed the jury to pass upon the questions, with instructions that such finding must acquit the accused if it was necessary to shoot the man to make the arrest. The occurrence at Benz's corner was not an unusual one. Where drunken men quarrel over a bottle of whisky, blows usually follow. While the blow may have been severe, it was not sufficient to cause Riley to fall, drunk as he was.

We called attention to Norton's statement about the ownership of the whisky, as well as to the evidence of Riley. In commenting on Norton's testimony we said: "You will take into consideration also what Norton says about the liquor. He said, in one part of his testimony at least, that the liquor was purchased for the four." Exception is taken to this language. It is claimed there was no intimation on the part of Norton that Gallagher had an interest in the liquor. The witness was asked: "For whom was that whisky?" He answered, "For all present there." Norton further says that

Gallagher came to the corner just as Riley left to secure the whisky. Riley says, 'I guess the whisky was bought for the crowd." "I do not know if Gallagher came there while I was there, or after I went for the whisky." "I know he was there when I came back." When Norton stated that it was purchased "for all present there," and the evidence shows that the four men were standing together when the liquor arrived, we do not think it is misstating Norton's evidence to say that according to his testimony the liquor "was purchased for the four," especially so when Riley adds that it was purchased for the crowd.

We called attention to the value of the pint bottle of whisky. Twenty-five cents was paid for it. The dispute over the bottle lasted several minutes, and we may safely assume that the three men whose title to the liquor was not contested helped themselves to some of the contents of the bottle before it was passed to Gallagher. No doubt its value was somewhat reduced before Gallagher obtained possession of the bottle. Whether the deceased had a felonious intent when he appropriated the liquor, was one of the inquiries to be solved by the jury. Our comments were in full accord with the ruling in Commonwealth v. White, 133 Pa. 188, where it was held that the jury should take into consideration the value of the property in determing whether the act was done with felonious intent.

Counsel for defendant offered to prove by the accused that "the deceased was arrested in what is known as the Bowery district of the Borough of Conshohocken; that the deceased was known to the police officer as a bad character; that the officer knew that unless he got him that night he would leave the town. This for the purpose of showing that the officer was justified in shooting to scare and stop the deceased in order to arrest him that night" We overruled the offer. The bad character of the accused is a proper matter for investigation before a jury where the question of self defence arises; otherwise not; Com. v. Straesser, 153 Pa. 456.

If a misdemeanor was committed, the accused had no right to shoot the fleeing culprit; if, on the other hand, a felony was committed, and the shooting was necessary to secure the man, the killing was justifiable. The bad character of the deceased could not change this rule of law. Nor was it necessary to offer any evidence to show that the defendant had the right to shoot to scare the fleeing man. We instructed the jury that it was not unlawful to shoot to scare the man. If that was the purpose and intent, then the jury were instructed to find whether the firing was reckless and careless. Even if there was error in the ruling the defendant was in no way injured by it, for on cross-examination the District Attorney opened the door upon this inquiry and the accused told all he knew or ever heard that was bad about the deceased.

We called attention to the evidence of the accused in which he said he intended to shoot in the air to frighten the fleeing man. We considered this evidence important if the jury find that there was an intentional shooting of the deceased. The intent and purpose of the officer when he fired was a material inquiry in at least one aspect of the case. If the accused falsified as to a material matter at issue, it was of grave importance when the jury came to consider his whole testimony. Whether a favorable or unfavorable inference should be drawn from this evidence, was submitted to the jury.

It is claimed we did not sufficiently comment on the evidence favorable to the view that the shots were fired in the air and not at the deceased. The weight of the evidence was clearly against the accused. Nearly all of the witnesses who were in the best position to view the occurrence testify that the arm was directed toward the fleeing man; that the flashes of the pistol were in a line with the deceased. That the second shot was so directed is evident, for some of the witnesses heard the deceased cry "Oh! oh!" Another witness says Gallagher gave a piercing cry. The defendant does not attempt to explain how it happened that the shot took effect if the pistol was directed up in the air. He did not trip or stumble as he fired, according to any of the witnesses. We called attention to the evidence upon this point, giving the name of some of the witnesses who stated

the shots were above the head of the fleeing man. We also called attention to the defendant's evidence wherein he stated that he did not shoot at the man. We did not name a single witness who contradicted this testimony but used the fol lowing general terms: "A number of witnesses, as I recollect (you will recolect their testimony,) say that the flash of the fire was towards the fleeing man, and that the arm was held out." An examination of the charge convinces us that our comments upon this branch of the case were more favorable to the accused than the testimony warranted.

A number of the reasons for a new trial allege that too much prominence was given to the evidence of the Commonwealth and too little attention to the testimony favorable to the defendant. We submit the charge as a whole, in answer to these complaints. As we view the case, it was the facts that pressed heavily against the accused and not the charge; Com. v. Orr, 138 Pa. 284.

The officer, under the evidence, either intentionally shot at the man or was so reckless in the use of his fire-arm, if he shot to frighten, that a jury was fully justified in convicting him if they found no felony was committed. The occurrence at Benz's corner was no more than a drunken brawl over a small bottle of whisky. There was no breach of the peace, but all danger of injury from the disturbers of the peace ended as soon as the officer appeared on the scene. The life of Patrick Gallagher was taken without any justification or excuse. We have no desire to mete out severe punishment, but where guilt is proven conviction should follow in the interests of law and order. No doubt the lot of a police officer is often a trying one, but this only proves that the appointing power should be exercised with great care. While courage is a necssary qualification, it is equally important that only men of judgment, discretion and coolness in cases of emergencies should be selected to fill these important positions. If a police officer may with impunity draw his revolver and shoot down the man who flees from a drunken fight, we shall soon lose that regard for human life which the experience of time has shown us is so important to maintain the welfare of any community. An officer carries his fire-arm for protection and self defence rather than for attack. This unfortunate occurrence happened late at night, but some of the citizens were still upon the street and their lives were endangered by the shooting on the public highway.

The conviction was fully justified by the evidence; any other finding would prove most dangerous to the citizens and misleading to the officers of the law.

The motion and reasons for a new trial are overruled, and the defendant will appear for sentence.

COMMON PLEAS.

C. P. of Lehigh Co.

Litzenberg v. Allentown School District.

Taxation—Constitutional law—Act May 25, 1897, P. L. 85.

The Act 25 May, 1897, P. L. 85, relating to taxation for school and school building purposes in cities of the third class, is unconstitutional, being in conflict with Article III of the Constitution of Pennsylvania.

Bill and demurrer.

The plaintiff, a real estate owner and tax-payer of the city of Allentown, complained that the said city comprises a separate and independent school district; that the Act of May 25, 1897, provides that in cities of the third class where the school district comprises the same territory as the city, the tax for school and school building purposes shall be levied on the assessment made for city purposes; that the defendant's board of control on the first Monday of July, 1897, levied a school and school building tax based upon the last adjusted valuation of subjects and things made taxable for state and county purposes, in accordance with the Act of 8 May, 1854, P. L. 617; that the defendant is now proceeding to collect said tax so levied; that the said controllers should levy the said tax in accordance with the Act of 1897; that the assessment made for county purposes, and that made for city purposes, differ greatly in valuation, and also as to subjects and things; that a levy based upon the city assessment will realize a larger amount of money, and consequently greater advantages for the education of the children of the citizens of Allentown; and prayed that the court declare the school and the school building tax as levied by

the said controllers, to be unlawful, and enjoin the defendant's controllers from collecting the taxes so levied upon the basis of the county assessment.

To which the defendant demurred that the Act of May 25, 1897, is void and unconstitutional, because it violates that portion of Section 7, Article 3 of the constitution, which provides that "The General Assembly shall not pass any local or special law regulating the affairs of school districts;" and that all levies of taxes for school and school building purposes must be based upon the last adjusted valuation of subjects and things made taxable for state and county purposes.

M. L. Kauffman for complainant.

R. J. Butz, Solicitor for the school district, demurring.

ALBRIGHT, P. J —Plaintiff's bill avers that the board of controllers of the public schools of the Allentown school district on July 5th, 1897, levied a school and school building tax based upon the last adjusted valuation of subjects and things made taxable for state and county purposes furnished by the county commissioners in accordance with the act of assembly relating to common schools, and that the district is proceeding to collect the tax levied as aforesaid; that said tax should have been levied in accordance with the provisions of the Act of May 25, 1897, P. L. 85, which declares that in cities of the third class where the school district comprises the same territory as the city, the tax for school and school building shall be levied on the assessment made for city purposes. that the two assessments in question differ greatly in valuation and also as to subjects and things; that if said levy of tax were based on the assessment for city purposes, a larger amount would be realized and better advantages for education of the children afforded and of which plaintiff would have his proportional benefit. The plaintiff prays that it be decreed that the tax levied as aforesaid is unlawful and that defendants be enjoined from issuing a duplicate for said tax and collecting the same. Allentown is a city of the third class, where the school district comprises the same territory as the city. Defendants demur to the bill on the ground that said Act of May 25, 1897, is void because it violates that portion of Section 7, Article 3, of the constitution of Pennsylvania, which declares that the general assembly shall not pass any local or special law regulating the affairs of school districts, and that under the laws of the commonwealth relating to school districts, the tax complained of is unlawful.

The Act of May 8, 1854 Sec 1 P. L. 617, declares that a system of common school education is deemed to be adopted according to the provisions of that act in all the counties of the commonwealth and that every township, borough and city of the commonwealth and those which shall thereafter be erected shall constitute a school district; Sec. 28 provides that the school directors or controllers shall annually determine the amount of tax for the ensuing school year; Sec. 29 provides that for the purpose of enabling the directors or controllers to assess and apportion such tax the county commissioners shall furnish a complete copy of the last adjusted valuation of proper subjects and things made taxable for state and county purposes, which property is made taxable for school purposes according to the provisions of said Act of 1854.

An Act approved May 29, 1889, P. L. 277, provides that in cities of the third class, a board of city assessors shall be elected who shall make an assessment of all property within the city subject by law to taxation for city purposes. An assessment made under this act is the assessment upon which plaintiff claims that said tax should have been levied in obedience to the direction of said Act of 1897 —as already stated defendants insist that the act last named is unconstitutional. Whether or not it is a violation of the constitution, is the question upon which the decision in this case depends.

Said Article 3, Section 7 of the State Constitution declares: "The general assembly shall not pass any local or special law * * * * regulating the affairs of counties, cities, townships, wards, boroughs or school districts * * * *"

In Wheeler v. Phila., 77 Pa. 338, it was decided that the Act of 1874, providing for the classification of cities is constitutional on the ground that such classification facilitates municipal government.

In Weinman v. Railway Co., 118 Pa. 192, the Supreme Court said, that such classification must be directed to the ex-

istence and regulation of municipal powers and to matters of local government; in Ruan St , 132 Pa 257, that a law that will bear the application of that test is within the purpose for which classification was designed, and therefore constitutional, and that a law that will bear its application is local and offends against the constitution; that all legislation not relating to the exercise of corporate powers or to corporate officers and their powers and duties is unauthorized by classification; in Wyoming Street, 137 Pa. 494, that if laws in question operate upon the exercise of some power or duty of a municipality of a given class, or relate to some subject within the purpose of classification, they are general, otherwise they are local; and in Van Loon v. Engel, 171 Pa. 157, that the collection of county, school and poor taxes is not a municipal purpose, that classification has been upheld for municipal purposes only, and that legislation for a class of cities is only general and valid under our constitution when it relates to some municipal purpose.

In Chalfant v. Edwards, 178 Pa. 246, it was held that the Act of July 3, 1895, P. L 588, providing for the establishing and regulating of the affairs of school districts and sub school districts in cities of the second class and for the repeal of all local and special laws inconsistent therewith, was a local and special law to regulate the affairs of school districts, therefore repugnant to Art. 3, Sec. 7 of the constitution. In the course of the opinion Justice Williams after stating that the classification sustained in Wheeler v. Philadelphia, supra, was to facilitate municipal government, said: "The common school system of this state rests on the general law of 1854; it is largely supported by state appropriations and is under the general supervision of the state superintendent. School directors are by no means municipal officers. They are not invested with any of the municipal powers nor are they charged with the performance of municipal functions. An attempt to regulate the affairs of school districts by local or special laws is expressly forbidden by the constitution in Art. 3, Sec 7, and until the common schools can be regarded as part of the municipal machinery necessary for the government of cities, this act which relates to cities of the second class must be treated as local in its character * * * The precise point was under consideration in the Appeal of the city of Scranton School Districts, 113 Pa. 176, and we there held that 'if an act regulating the affairs * * * of school districts either produces or may produce local results, it offends against article third of the constitution and is therefore void.'"

It might be suggested that the acts relating to the assessments for state and county purposes and said Act of 1889, concerning city assessments substantially provide the valuation shall be what the property would sell for at a fair sale and that therefore it is immaterial which assessment is taken as a basis to levy the school tax, but the assessments are made by officers selected differently and the boards of revision are differently constituted. Manifestly the legislature that passed that Act of 1897, conceived that the results of the two systems of assessment would be different; that there is a difference, is the ground of plaintiff's complaint. No doubt the result is not the same—at any rate the methods are different. Said Act of 1897 may produce local results, and therefore the legislation is local and in conflict with said provision of the constitution.

The levy of the tax complained of in plaintiff's bill is warranted by law.

In as much as plaintiff's demand was that a statute enacted by the legislature and duly approved, should be obeyed and a judicial inquiry was necessary to determine the question as to its validity, it is deemed that it would not be equitable that the plaintiff should pay the costs; the same is true of the individual defendants who are the controllers and officers of the board. The people interested in the affairs of the district were concerned to know whether or not said Act of 1897 was constitutional. The costs ought to be paid out of the treasury of the district.

October 16, 1897, this cause came on to be heard on demurrer to the plaintiff's bill, at this term, and was argued by counsel and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows: that defendants are not required to make any further or other answer to the plaintff's bill, that thesaid bill be dismissed, and that the school district of the city of Allentown pay the costs.

York Legal Record.

Vol. XI. APRIL-MAY, 1898. Nos. 10 & 11.

QUARTER SESSIONS.

In re Newberry Election.

Contested Election—Marking of ballot—Intention.

Two of the ballots were marked with a cross in the circle at the head of the column, but two names in that column were erased and a cross put opposite the names of the candidates in the opposition column. HELD, that the entire ballot must be rejected.

Under the new ballot law, it is not enough that the intention of the voter may possibly be ascertained, or his irregular or equivocal acts explained by evidence dehors his ballot. The purpose of the legislature, in prescribing the form of ballot and specifically directing how it should be prepared and used by the voter, was to avoid all such inquiries and the consequences likely to result therefrom. It was intended that the ballot, when prepared by the voter and delivered to the proper election officer should be per se self-explanatory.

Compliance with the provisions of the Act of 1893, furnishes the only safe guide to the intention of the voter and the facilities offered for such compliance are quite sufficient to render a non-compliance inexcusable.

It is apparent that the electors preparing the ballots, did not intend to vote for every candidate of the Republican party; hence they could not vote for said candidate by marking said ballot with a cross only, in the circle above the Republican column. To legally vote, it was necessary for each of them to make a cross opposite the name of each candidate they desired to vote for in the appropriate blank opposite their respective names on the said rejected ballots.

Contested election.

The facts upon which the contest is based are given in the Court's opinion.

Cochran & Williams for contestants.

Geise & Strawbridge for respondents.

March 28, 1898. BITTENGER, P. J.—At the spring election in Newberry township, in the county of York, on the 15th day of February, 1898, Augustus G. Kohr was the Democratic candidate for assessor and Noah S. Gosnell the Republican candidate for the same office, and their names were regularly placed on the ballot containing the party nomination, duly certified to the Commissioners.

The returns of said election as they appear on file, in the office of the Clerk of the Courts, show that at said election Augustus G. Kohr received one hundred and seventy-two votes and that Noah S. Gosnell received one hundred and seventy-one votes.

Within the time prescribed by law a petition of qualified voters, at said election, sufficient in law, was filed, contesting the election of Augustus G. Kohr to to the office of assessor, because three ballots, more than enough to change the result, legally cast for Noah S. Gosnell for said office of Assessor, were illegally not counted for him, by the officers of the election, but were rejected as illegal ballots.

The answer filed denies that any ballots legally cast for Noah S. Gosnell, were illegally rejected by the officers and not counted. A replication to the answer was filed joining issue, and this is the question now before the Court for determination.

After hearing the testimony of the several election officers the facts, as to the character of the rejected ballots, were clearly established and it was not, therefore, found necessary to open the ballot box. This was conceded by the counsel in the case. Two of said ballots were shown to be marked with a cross in the circle over the Republican column, with the names of David Able and Albert C. Burger, candidates for Auditor, in the Republican column, erased, and with a cross mark in the square space opposite the names of Jacob G. Myers and Jacob M. Schroll, candidates for Auditor in the Democratic column.

The third of said rejected ballots contains the cross mark in the circle at the head of the Republican column, with the name of Harvey H. Writer, Republican candidate for Supervisor, erased, and a cross mark in the proper square space to the right of the name of John N Wilt, the candidate for said office of Supervisor, in the list of candidates made on nomination papers, on said ballot.

The contestants contend that the intention of the voter clearly appears in each instance, to vote the whole Republican ticket except for the candidates where names are erased, and the cross mark of the voter placed in the ploper place to the right of opposition candidates, and that therefore, those three votes should be counted for Noah S. Gosnell, by which he would be elected by a majority of two.

The contestee as stoutly insists that neither of said three rejected ballots can be counted for Noah S. Gosnell, because they are illegally marked; that they are not self-explanatory, and therefore invalid.

On first impression we were inclined to the opinion that the intention of the voters was to vote the whole Republican ticket, with the exceptions noted, and that such intention must be accepted by the Court, and ballots be counted for Noah S. Gosnell, insuring his election. Upon numerous decisions of the Courts of Common Pleas, the court is to enquire only as to the intention of the voter, and when that is arrived at, to count the ballot accordingly; and it has been held in many cases that slight evidence of an intention to vote for a candidate by any mark or indication, is sufficient.

When the Supreme Court came to construe the law applicable to the system of voting under the Baker ballot law, it clearly disapproved of the liberal construction by the lower Courts, and it has established the principle that the voter must be held strictly to the requirements of the law; that his ballot must be self explanatory. "Under the new ballot law, it is not enough that the intention of the voter may possibly be ascertained, or his irregular or equivocal acts explained by evidence dehors his ballot. The purpose of the legislature, in prescribing the form of ballot and specifically directing how it should be prepared and used by the voter, was to avoid all such inquiries and the consequences likely to result therefrom. It was intended that the ballot, when prepared by the voter and delivered to the proper election officer, should be per se self-explanatory. There is no good reason why it should not be so;" Redman's Appeal, 173 Pa. 57. In that case it was held that the proper marking of a name in the proper column and the additional insertion of the same name in the blank space prepared for the insertion of names not printed, in writing on the ballot, rendered the ballot illegal, because the voter was presumed to understand the law, and it was further presumed that the written name, although the same regularly printed in the column on the ticket, was of another person and the ballot was vitiated and could not be counted.

"The presumption is that the vote knows where and how to mark his ballot. He is furnished, on his request, with a card of instructions, and a specimen ballot, and if by reason of any disability he desires assistance in preparing his ballot, he is permitted to select a qualified elector of the district, to aid him in the preparation of it. Compliance with the provisions of the Act of 1893, furnishes the only safe guide to the intention of the voter and the facilities offered for such compliance are quite sufficient to render a non-compliance inexcusable;" Contested election of Flynn, 181 Pa. 457. In that case the Court refused to count a ballot marked with the figure 1 in the proper square after the candidate's name instead of an X, and another ballot marked with an X in the square immediately below the proper square on the ballot, notwithstanding said line did not contain any printed name.

"In so far as the mode of voting is specifically prescribed by the act, all other modes are, by necessary implication, forbidden. *Expressio unus is exclusio alterius.* The ordinary rule, as has been stated by recognized authority, is that where power has been given to do a thing in a particular way, then affirmative words marking out the way, by necessary implication, prohibit all other ways;" McCowin's Appeal, 165 Pa. 233.

"The direction, of the act as to what a voter shall do, and how it shall be done, are plain, explicit and mandatory. No substantial departure from those directions can ever safely be recognized as their legal equivalent;" Lawlor's Appeal, 180 Pa. 566. It was held in that case that a ballot could not be counted for a candidate when his name and the title of the office had not been printed on the ballot, but upon separate tickets or stickers which had been inserted and pasted upon the official ballot by the elector.

Section 22 of the Act of 1893, prescribes the manner of voting under said act as follows: "On the receipt of his ballot the voter shall prepare his ballot by marking, if he desires to vote for every candidate of political party, a (X) in the circle above the column of such party; if otherwise he shall mark, in the appropriate margin or place a cross (X) opposite the party name of political designation or group of candidates for presidential electors, and opposite the names

of the candidates of his choice, for such other officers to be filled, according to the number of persons to be voted for by him for each office," &c

A careful reading of this section makes it certain that the elector can only vote by marking a cross mark (X) in the circle above the column of the party of his choice, when he desires to vote for *every candidate of such party*. When he does not so intend, for all candidates except presidential electors in voting he must make a cross in the blank space on the ballot, opposite the name of the candidate.

From the erasures of the names of the Republican candidates mentioned, on the three ballots in question and the marking of the cross opposite the names of other candidates, in opposition, whose names where on the ballots in other columns in the appropriate spaces, it is apparent that the electors preparing the ballots, did not intend to vote for every candidate of the Republican party, hence they could not vote for said candidates by marking said ballot with a cross only, in the circle above the Republican column. To legally vote, it was necessary for each of them to make a cross opposite the name of each candidate they desired to vote for in the appropriate blank opposite their respective names on the said rejected ballots.

Under the rulings of the Supreme Court, they are presumed to have known where and how to mark their ballots and were required to strictly follow the man dates of the law. The specimen ballots contain this instruction in prominent type: "Those who do *not* desire to vote a *straight ticket* must not mark a cross within the circle at the head of the column."

The decisions of the Supreme Court cited, logically lead us to a conclusion, that neither of the ballots in question were legally marked for Noah S. Gosnell; that neither of them evidenced a vote for said candidate, for the reason that they do not have a cross in the appropriate space opposite his name, on either of said ballots.

It follows that all of said ballots were properly rejected by the election officers, and cannot be counted for Noah S. Gosnell. Augustus G Kohr received a majority of one vote, as is shown by the returns, is elected assessor, and is entitled to said office. It is so ordered and decreed.

The question at issue in this case, never having been directly decided by the Supreme Court, we cannot decide that this contest was made without probable cause. We therefore order the township of Newberry pay the costs.

Road in York and Springettsbury Townships.

Road law—Commissioners—Notice.

One of the exceptions to the report of the viewers was that no notice of the view had been served upon the County Commissioners. The evidence showed that a copy had been left with a clerk in the office. In the absence of any assertion or evidence that the notice was not received by the Commissioner in whose district the proposed road was located, the exception will be dismissed.

The exceptant in this case has no standing to file this exception. He could not be injured by want of legal notice to the County Commissioner, entitled to notice. The provision is manifestly for the protection of the county only.

Exceptions to report of viewers.

Exceptions to the within report of viewers in road case No. 1 of August sessions, 1897.

1 No copy of the notice of the time and place of holding the view has given to one of the County Commissioners at least ten days before the view, as required by rule of court.

2 The viewers refused to hear the undersigned exceptants in opposition to the road at the time of the view and would not listen to any remonstrances against the necessity of the road or the course or width thereof, but "*proceeded to lay out a road as agreeable to the desire of the petitioners as might be*," as set forth in their report.

3 The viewers do not assess and award any damages to any person interested, but merely state in their report that they "are of opinion that Henry Gochenour" and others mentioned "will sustain damages" etc., etc.

4 The proposed road, if laid out will be parallel to another public road for its whole length and within about five hundred feet of said other public road and would, therefore, be the occasion of an unneccessary burden upon the public both in the opening and the maintaining as a public road afterwards.

Geise & Strawbridge for exceptions.

E. D. Ziegler for exceptions.

March 26, 1898. BITTENGER, P. J — None of the exceptions filed were relied upon at the argument, except the first, alleging want of service of notice of the view, upon one of the County Commissioners. The 9th Section of the Special Road Law of this County, of February 18th, 1860, P. L. 61, provides: "That it shall be the duty of the persons interested, to give at least ten days notice, to one of the County Commissioners, of the time and place of holding all views, reviews and reviews, for the assessment of damages held under authority of this act."

The proof of notice attached to the report, shows that a notice as provided in the act of assembly, was left with Miss Sallie Heller, one of the Clerks of the County Commissioners, at the Commissioner's Office, more than ten days before the view.

It is admitted that none of the County Commissioners attended the view. It is well known to us that while practicing law, under the statute in question, it was customary to leave a copy of the notice at the Commissioner's Office at least ten days before the view; and by an arrangement between the Commissioners and their Clerk, the Commissioner in the district of the proposed road, was notified by the Clerk of the view or review, of which notice was so given.

This practice has doubtless continued, and there is not any evidence or even assertion by the Commissioners that legal notice was not received by the proper Commissioner.

The section of the act in question is for the protection of the county from payment of exorbitant or unjustifiable damages. By the 6th section of the same act, it is made the duty of the Clerk of the Court of Quarter Sessions to lay all reports on roads and bridges before the County Commissioners to be examined by them; and they are required to report for the information of the Court, what they know in the premises.

It is presumed that public officers have done their duty. Yet no information against this report has been afforded the Court by the Commissioners; no complaint; no exceptions. We must therefore conclude that the notice was received by the proper Commissioner, in the required time, before the view.

The exceptant in this case has no standing to file this exception. He could not be injured by want of legal notice to the County Commissioner, entitled to notice. The provision is manifestly for the protection of the county, only. It is for the purpose of giving the County Commissioners an opportunity to be heard by the viewers upon the question of assessment of damages by the viewers. If they are satisfied with the assessment of damages by the viewers, and neither wish to complain, or except to the neglect of the parties in interest to give them legal notice, as required by the act, no one else can complain; Friendsville Road, 16 C. C. R. 172.

The exceptions are dismissed and the report confirmed.

SUPERIOR COURT.

The City of Chester v. McGeoghegan et al.

Municipal corporation—Suit to recover assessment for municipal improvements—Jurisdiction of magistrate—Practice.

A magistrate may be given jurisdiction of an action to recover the amount of an assessment for a municipal improvement by a waiver of the city's right to recover a penalty, the amount of the claim being thereby kept within $300.

The same principle which permits the waiver of interest, in order to give a magistrate jurisdiction, applies with greater force to a waiver of a penalty; the penalty being merely collateral and foreign to the debt itself.

Appeal from the judgment of the Court of Common Pleas of Delaware County.

The facts in this case are fully stated in the opinion of the court.

Charles A. Lagen and *J. V. McGeoghegan* for the appellants.

A. A. Cochran (City Solicitor,) for the appelle.

January 18, 1898. WICKHAM, J.—The city of Chester had the right, under the Act of May 23, 1889, P. L. 272, and an ordinance passed in accordance therewith, to sue for, and recover from the appellants a municipal assessment of $220.55, together with interest and a penalty of five per centum, amounting in all to $308.76.

Instead of sueing for the latter sum, the city threw off the penalty, amounting to $11.02, and brought suit before an alderman for the debt and interest only, the aggregate of both being less than

$300. The only question before us is, whether the plaintiff could give the alderman jurisdiction, by waiving its right to the penalty, and thus bringing the claim, below $300, the maximum amount for which an action could be brought before the magistrate.

We have no hesitation in holding that this could legally be done. In Evans v. Hall, 45 Pa. 235, it was decided, that while one cannot by relinquishing a part of his debt give a justice of the peace jurisdiction, he may accomplish that result by refraining from claiming interest, the reason assigned being that the interest is no portion of the debt proper, but merely incident thereto. There is much stronger reason for saying that the penalty, in the present case, is no more than an incident of the indebtedness. Interest, where it can be claimed as of right, is now popularly regarded as an outgrowth of the debt and therefore practically a part of it, whereas a penalty is something collateral and foreign tacked on to the principal thing.

The appellants argue, however, that the city, because it is a municipality, having its powers and duties defined by statute, cannot legally sue for less than the principal, with the interest and penalty attached. To this we cannot assent. The proper municipal officers may compromise claims, or remit them in whole or in part, when delay and expense may be saved by so doing, being responsible at the proper time and place for any breach of duty. The appellants are not in court as citizens, defending the rights of the city, but as mere debtors refusing to pay a just debt, on the sole ground that the plaintiff might have sued for more. They cannot be heard to object, in this proceeding, that the city authorities have done what any private suitor might lawfully do, to secure a standing in the alderman's court.

Judgment affirmed.

COMMON PLEAS.

Billet v. The York Southern Railroad.

Railroad—Crossing track—Negligence.

The uncontradicted evidence showed that the plaintiff's horses approached defendant's track at a high rate of speed, and as the driver was unable to control them they attempted to cross the track and were struck by an approaching train. HELD, that it was not error to give binding instructions to find for the defendant.

The plaintiff's driver could not control the team, and stop to look and listen, then that is the plaintiff's misfortune. The horses then stood in the position of trespassing animals upon the railroad, and the plaintiff can not recover.

Motion for new trial.

E. D. & E. Dean Ziegler for motion.

Niles & Neff, contra.

March 25th, 1898. BITTENGER, P. J. —In this case the defendant submitted points asking for binding instructions in favor of the defendant.

The uncontradicted evidence is that the plaintiff's servant in charge of his team, on the day of the accident, was approaching the track of the defendant company on Walnut street, in this city. The two horses were wild but not runaway horses. The horses were frightened at the noise of the tack works a distance of perhaps one hundred and fifty yards from the track of the railroad, and started off briskly, but the driver through the use of the lines and the brake, got them under control, after which they went at a brisk trot. He applied the brake, one hundred yards from the railroad track and held on, to stop them, but they went on at a brisk trot upon the railroad track, when the wagon was struck by the locomotive and injured in the manner detailed by the witnesses. The driver says he could not hold the horses or control them, and that he first saw the train when the horses were on the track and the wagon was struck by the locomotive. He did not, at any place, on the street, when approaching the railroad crossing, stop, look and listen, as required by the decisions, for the train. And although it was proven he could see the train for a considerable distance after passing the tack factory, he did not even see or hear its approach and stop, or turn his horses from the track. The rule that a driver approaching a railroad crossing must stop, look and listen, is imperative; Myers v. B. & O. R. R. Co., 150 Pa. 386; Sullivan v. R. R. Co., 175 Pa. 361. It is entirely unnecessary to further cite from the great mass of authorities on this point.

If the plaintiff's driver could not con-

trol the team, and stop to look and listen, then that is the plaintiff s misfortune. The horses then stood in the position of trespassing animals upon the railroad, and the plaintiff can not recover; Fisher v. Penn'a R. R Co., 126 Pa 293

For the reasons stated, we felt it clearly incumbent upon us to give the jury bind ing instructions in favor of the defendant.

After the argument of the motion and careful consideration, we are not convinced of error in affirming defendant's points.

Hence this rule must be discharged. The rule is discharged.

C. P. of Dauphin Co.

Young, Guardian, &c. v. Young.

Judgment creditors—Revival of judgments—Collection clause—Duty of plaintiff to see that his judgment is properly entered.

The lien of a judgment depends upon the condition of the record at the time of its entry, and cannot be affected by a subsequent revival of an earlier judgment purporting to give such senior judgment creditors rights which did not exist at the time of the entry of the junior judgment.

Hence where a judgment was entered on a note in 1886 containing no collection clause, and in 1891 such judgment was revived by agreement with all the waivers and conditions contaiced in the original judgment, and in 1896 again revived by agreement which provided for an attorney's commission of five per cent. for collection, it was HELD that the lien of a judgment entered in 1893 was not affected by the provision for the collection clause in the revival of the earlier judgment in 1896.

So, also, where a judgment was entered in 1886 contain ng a clause for commissions, and was revived in 1891 without the collection clause, and was revived again in 1896 with all the waivers and conditions contained in the original agreement, it was HELD that the lien of a judgment entered in 1893 was not affected by the revival of 1896, and that the revival of 1891 amounted to a waiver of the collection clause contained in the original judgment.

It is the duty of the plaintiff to see that his judgment is properly entered, hence the owner of a jun or judgment, upon finding that a senior judgment has been revived by agreement without a collection clause, notwithstanding the fact that the agreement of revival filed as a part of the re ord of the case shows that the judgment was to have been revived with all the waivers and conditions contained in the original judgment, may safely conclude that, for some reason satisfactory to the parties, they have decided to drop the collection clause from the revival after the execution of the agreement to revive, and the lien of his judgment is not affected by such collection clause in the agreement to revive.

Exceptions to auditor's report.

I. C. Durbin and *L. M. Neiffer* for exceptant.

A. F. Thompson, contra.

May 14, 1897. MCPHERSON, J.—The fund for distribution is the proceeds of real estate sold upon execution. It was bound by the lien of several judgments, among which only four need be considered. The dispute concerns a claim for a five per cent. collection fee upon three of the judgments, the claim being resisted by the fourth (or Wallace judgment) because, if allowed, it will diminish the sum to be paid to that lien.

The first judgment to be noticed was entered in 1886 upon a note containing no collection clause. In 1891 the judgment was revived by agreement 'with all the waivers and conditions contained in the original judgment;" and in 1896 it was again revived by agreement, and now for the first time appeared the clause providing for "an attorney's commission of five per cent. for collection." Between the parties this additional provision would no doubt have been enforceable; Early v. Zeiders, 137 Pa. 457; but meanwhile, in 1893, the Wallace judgment had been entered, and it need not be argued that this subsequent agreement could not affect the rights of that judgment. As these two liens were in 1893, so do they continue; and since the collection clause was not then a part of the older lien, it cannot now be enforced against the Wallace judgment

The second judgment to be considered stands upon a somewhat different footing. As originally entered in 1886, it contained a clause for commissions. In 1891 it was revived by the following agreement: "The plaintiff * * * and the defendant in the above stated judgment do hereby agree to revive the same amicably for the sum of $1,000, with interest from Jan. 1, 1891, and costs; and authorize the prothonotary of Dauphin county so to enter judgment of revival of the same upon the record, with the same effect in all respects as if a *scire facias post annam et diem et quare executionem non* to revive and continue the lien of said judgment, according to the Acts of Assembly, had been issued and served on the defendant, and judgment had been entered thereon in open court." In 1896 the judgment was again revived by an agreement containing this clause—"with all the waivers

and conditions contained in the original judgment." But the last revival needs no attention; for as already stated, the Wallace judgment was entered in March, 1893, and the condition of the record at that time must determine the relative rights of these two judgments. Both the judgment docket and the appearance docket, in August, 1886, contained a proper reference to the collection clause; but neither docket, in its note of the revival in 1891, refers to that clause at all. This was a proper omission, because, as will be seen by recurring to the agreement, that paper did not make the collection fee a part of the revival. The agreement is merely to revive for a specified sum, with interest and costs; and the prothonotary is authorized "so to enter judgment of revival." Therefore, the entries upon the judgment docket and upon the appearance docket were in strict conformity with the authority given by the agreement to revive; and the record conclusively disclosed, as to subsequent lien creditors, that the parties had chosen to drop from the revival an incident that was part of the original judgment. This they had a right to do, and having done it they are bound by their own act.

The third judgment presents a different state of facts. As originally entered in 1886 it contained a collection clause. In 1891 it was revived by the following agreement: "It is hereby agreed that the prothonotary of said court enter an amicable *scire facias* upon the above judgment, with the same effect as if a *scire facias* to revive the same had been regularly issued, served personally on the defendant by the sheriff of said county and duly so returned, and that a judgment be entered thereon in favor of the plaintiff and against the defendant, with all the waivers and conditions contained in the original judgment, for the sum of $1,416, being the amount of debt and interest due on the original judgment on October 18, 1891." In 1896 the judgment was again revived by an agreement containing a collection clause; but, as already stated, in a contest with the Wallace judgment entered in 1893, the revival in 1896 must be disregarded. Recurring, therefore, to the revival of 1891, it is further to be observed that neither the appearance docket nor the judgment docket contains any refference to a collection fee. Both dockets in 1896, however, refer to it properly. Accordingly the question is: Does the aggreement of 1891—that a judgment of revival be entered "with all the waivers and conditions contained in the original judgment"—carry into the revival the collection clause of the original? The auditor answered in the negative, but put his decision mainly upon the ground that the judgment docket contained no reference to this clause, and that a subsequent lien creditor is not bound to look beyond the judgment docket. We do not pronounce this reason unsound. Numerous decisions support the general doctrine stated by the auditor; but there are other cases—of which Biddle v. Tomlinson, 115 Pa. 299; Saunders v. Gould, 134 Pa 461, and Meigs v. Bunting, 141 Pa. 233 may be cited as examples—that impose upon persons interested in examining the record the duty of going beyond the judgment docket, and even beyond the appearance docket, and of examining the papers upon the file. In view of these cases, we will follow the exceptant and assume that such duty rested upon the owner of the Wallace judgment in 1893. What then, would he have found upon examination? Neither upon the judgment docket nor the appearance docket would he have discovered any reference to the collection clause. If he had gone farther and examined the agreement of revival—and certainly no more than this could be required—he would have discovered there a provision that a judgment should be entered with certain waivers and conditions; but he would also have discovered that this provision, even if it were intended to embrace the collection fee of the original judgment, was not carried out; for the judgment of revival, as entered and noted upon the appearance docket, and upon the judgment docket, does not contain this clause. As it is the duty of a plaintiff to see that his judgment is properly entered; Ridgway's Appeal, 15 Pa. 177; Coyne v. Souther, 61 Pa. 455; Kistler v. Mosser, 140 Pa. 367, the owner of the Wallace judgment might safely conclude that, for some reasons satisfactory to the parties, they had decided to drop this clause from the revival. The record therefore being in this condition when his own judgment was entered, cannot now be changed to his prejudice.

The auditor was right in refusing to allow the collection fee claimed, to the injury of the Wallace judgment. The exceptions are dismissed, the report is confirmed, and distribution is decreed in accordance therewith.

C. P. of Lancaster Co.

Com. ex rel. Fraelich v. Sherman.

Bond in desertion—Discharge of Surety—Surrender of principal.

A surety on a recognizance conditioned for the payment of a weekly sum which the court had ordered the principal to pay to his wife in desertion proceedings, cannot be absolved from liability by surrendering the body of the principal; the obligation of the recognizance can only be discharged by payment.

In a suit on the bond of F., a defendant in desertion proceedings who had been ordered to pay a weekly sum to his wife and had defaulted, against S., one of his sureties thereon, an affidavit of defense averring that S. had signed the bond not as principal, but only as surety in case F. signed and entered into the same, and F. had not signed it, and that the court had granted leave to S. to surrender the body of F., and process for his arrest was in the hands of the sheriff, is insufficient.

Rule for judgment for want of a sufficient affidavit of defense.

This was an action on a bond given by Amos Fraelich, who had been convicted of desertion conditioned for the payment of $3.00 a week which the Court had ordered him to pay for the maintenance of his wife. The bond was signed by L. G. Sherman and W. M. Morrin, but not by Amos Fraelich himself, although his name appears in the body of the bond as one of the obligees.

The defendant's affidavit of defense set forth:

"That the bond upon the said suit is brought dated August 27, 1894, purports to be the joint bond of Amos Fraelich, L. G. Sherman and Wm. Morrin, whereas only L. G. Sherman and Wm. Morrin signed the same, and the said Amos Fraelich never entered into any bond, and that said L. G. Sherman and W. M. Morrin were not intended as principals in said bond, but only as sureties in case the said Amos Fraelich signed and entered into the same.

That the present suit is brought jointly against Amos Fraelich, L. G. Sherman and W. M. Morrin, and purports to be on a bond a copy of which is attached to plaintiff's statement, whereas the bond shows that Amos Fraelich never signed the same. A joint action could not therefore be maintained.

That William M. Morrin is now dead, and was dead at the commencement of this suit, and that La Roy H. Morrin is his administrator. That no judgment can be taken against the estate for want of a sufficient affidavit of defense, and as the action as brought and declared on is a joint action, no judgment can be entered against any one of the joint parties, the one being dead as aforesaid.

That a petition was duly presented to the Court of Quarter Sessions by L. G. Sherman, this affiant, praying the Court to grant him leave to surrender the said Amos Fraelich whereupon the said Court granted a rule to show cause, which on July 6, 1895, it made absolute, and ordered process to issue out of said Court for the arrest of said Amos Fraelich, which said process is now in the hands of the high sheriff. He submits that no action is in the meantime sustainable upon the said bond, even if it is deemed a valid obligation.

All of which this affiant avers to be true and correct, and expects to be able to prove upon the trial of this case."

The following were the reasons specified on taking out the above rule:

"1. The caption, statement and all papers filed of the above suit having been amended, the reasons alleged in the affidavit of defense no longer exist, and judgment should be entered against L. G. Sherman.

2. The affidavit of defense is evasive.

3. L. G. Sherman, having signed the bond in two places does not affect his suretyship. The bond being joint and several, he is responsible.

4. The bond was approved by the Court in chambers, and not during the sessions of the Court, and if the attorney for the principal and sureties presented a bond, not signed by the principal, to the Court for its approval, he certainly should not now asked to take advantage of it.

5. The asking of a bail piece is no defense to an action on the bond."

W. H. Roland for rule.

Chas. I. Landis, contra.

April 18, 1896. LIVINGSTON, P. J.—In the case under consideration, one Amos Fraelich was convicted before the Court of General Quarter Sessions of the

Peace in and for the County of Lancaster, at August Sessions, A. D. 1894, of having wilfully deserted his wife, Susan Fraelich, and his child. And upon such conviction said Amos Fraelich was sentenced on the 25th day of August, 1894, to pay to the said Fraelich, the prosecutrix, the sum of $3.00 per week, for the maintenance of the said Susan and her child, from the 25th day of August, A. D. 1894, and the Court having directed a bond to be given by the said Amos Fraelich, with sufficient sureties to the Commonwealth of Pennsylvania in the sum of $300 for the faithful performance of said order for maintenance of the said Susan and her child, the said Amos Fraelich on August 27, 1894, presented a bond in the sum of $300, with two sureties, one of whom was L. G. Sherman, binding them jointly and severally to pay said sum of $300, upon condition that if the said Amos Fraelich shall, and do, from time to time, and at all times hereafter, faithfully and truly perform such order of the said Court, for the maintenance of the said Susan and her child, then this obligation to be void, or else to be and remain in full force and virtue.

Amos Fraelich having made default in the payment of said weekly allowance, suit has, as we have seen, been brought upon the bond, and now we are asked to enter judgment because no sufficient affidavit of defence has been filed.

In Miller v. Commonwealth, 127 Pa. 122, a case like the present, suit had been brought against Miller as surety, and he filed an affidavit of defense, which was alleged to be insufficient. The ground of defense set up in the affidavit was that the said recognizance, becoming burdensome to your deponent (defendant in the suit and bail,) he produced the body of the said Thomas B. Miller (the defendant in the desertion proceedings) before the Court of Quarter Sessions * * * and offered to surrender him into custody for the purpose of relieving him of his recognizance. * * * The Court declined to permit the deponent, the bail, to surrender the principal into custody in relief of the recognizance, and held that the recognizance could not be discharged in any other way than by payment of the same, etc.

Bucher, P. J., says: "We come now to consider the merits of the affidavit (of defense) stripped of all verbiage. The affidavit sets up as a ground of defense that the defendant (Thomas J. Miller) became surety for Thomas B. Miller, who had been ordered to pay a stipend to his wife, who he had deserted, and that, having paid a portion of the stipend which by his recognizance he agreed to do, he became weary of paying more, and that his offer to surrender his principal to jail was a satisfaction of his recognizance.

If recognizances entered into in desertion cases can be satisfied and paid in this way, there would be no advantage in taking them other than to enable the principal debtor and his surety to select the most fitting season of the year for the former to serve his time in jail. The defendant was not bound to enter into recognizance. He did it voluntarily, and by the very terms of the obligation he could only absolve himself by payment, and not by the surrender of the body of the principal to the common jail.

In Commonwealth v. Gaul, 2 Wood Dec. 70 it is said: 'It was the manifest purpose of the criminal procedure act of March, 1860, to give the surety of the defendant in a criminal prosecution the right to a bail piece only while the original complaint was pending and undetermined, and before a final liability on the part of the surety had been incurred.' Such a bail piece was held to be a sufficient warrant of authority for the proper sheriff or jailor to receive the said principal and have him forthcoming to answer the matter or matters alleged against him. It was also held in Directors of the Poor v. Dugan, 64 Pa. 402, that the surety of the party sentenced for bastardy could not absolve himself from liability save by payment. Commonwealth v. Jones 90 Pa. 432, does not sustain the contention of the defendant. It simply decides that the Quarter Sessions has power to modify orders and decrees in desertion cases, and that such action cannot be reviewed in the Supreme Court. To the same effect is Philadelphia City v. Owens, 12 W. N. C. 292. If we give these cases their full force and effect it will not aid the defendant. We know of no statute or rule of law which requires the Court, at the instance of a surety in a desertion case, to accept the body of the defendant in satisfaction of the recognizance." Judgment was entered in the Court below against

the defendant Miller, the bail, the case was taken to the Supreme Court, and in per. cur. the Supreme Court says: "The judgment is affirmed upon the opinion of the learned judge of the Court below."

The law is so clearly stated in the above case, and the position of the defendant in this case so clearly defined as to show that no defense he could make would avail him, and no sufficient defense has been offred.

We therefore make the rule absolute, and enter judgment against the defendant for the sum of three hundred dollars, the amount stated in the bond.

Emig's Assigned Estate.

Dower—Arrears of interest—Distribution.

E accepted a purpart of his deceased father's real estate at the appraised value, subject to a dower charge in favor of his mother. He paid her the interest until about four years before her death. A few months after her death he made an assignment for the benefit of creditors, and the real estate sold for a sum insufficient to pay the principal of the dower and the arrears of interest. Before the Auditor the widow's administrator claimed a dividend on the arrears of interest, while the heirs claimed the whole of the balance. The Auditor distributed the sum pro rata between the two claimants. On exceptions filed, on behalf of the heirs, HELD, that the exceptions must be sustained.

The arrears of dower, capable of ascertainment, are divested and thrown upon the fund produced by the sale. It is the duty of those interested to see that the property sells for sufficient to cover such arrearages.

The heirs, in the absence of notice, had a right to believe that the proper payments of interest had been made or released.

As the widow can never have any right to any part of the principal, neither can her administrator; especially without proof of notice at the sale, to enable the heirs to protect themselves.

Exceptions to Auditor's report.

The report of the Auditor, E. Chapin, Esq., on the question in dispute, is as follows:

The main contention before your Auditor is between the Administrator of the estate of Anna Mary Emig, deceased, and judgment lien creditors.

The facts as agreed upon, derived from the records of the Orphans' Court and Court of Common Pleas and found by your Auditor from the notes of evidence taken by him are these:

George B. Emig died seized of certain real estate leaving to survive him a widow, Anna Mary Emig, and seven children. In the partition of his realty a purpart of his real estate designated as No. 1 B, was taken by one of his sons, Martin Emig, the assignor, subject to a dower charge of four thousand eight hundred and seventeen dollars and seventy-two cents, ($4,817 72,) the interest whereof was payable to Anna Mary Emig, widow of said George B. Emig for and during her natural life annually on the first day of April of each year, the first payment of interest to be made on April 1st, 1878, and at her death the principal sum to be paid to six of the children of said Geo. B. Emig, to wit: Martin Emig, Jacob Z. Emig, Henry Emig, Sarah Ann Grove (late Emig,) and Anna Emig (now Harlacher,) and Edward F. Emig, in equal shares; George Emig the remaining child who would otherwise have been entitled to a share having been at the death of his father indebted to his estate in a sum more than his whole share thereof, and was by the decree of the Court omitted from the names of the children entitled to participate in the said principal sum.

The said Martin Emig also accepted parcel No. 3 of the real estate of his said deceased father, George B. Emig, but this parcel was free and clear of any dower charge the entire dower fund having been by agreement of the heirs charged upon No. 1 B aforesaid.

Martin Emig paid the interest due his mother, Anna Mary Emig, to wit: the sum of two hundred and eighty-nine dollars and six cents under the above dower charge annually up to and including the payment falling due April 1st, 1891; the widow died on the second day of December, 1895, and at the time of her decease the arrearages of her dower interest were thirteen hundred and forty-nine dollars.

On February 22nd, 1896, a few months after the decease of Anna Mary Emig, Martin Emig and wife executed and delivered to Samuel H. Harlacher a voluntary deed of assignment of his real and personal property in trust for the benefit of the creditors of said Martin Emig, and in the fall of 1896, Samuel H. Harlacher,

as assignee, sold the above real estate, No. 1 being the realty on which the dower fund of $4,817 72 was charged, free of said charge for the sum of five thousand dollars, and sold parcel No. 2 of assignor's real estate on which there was no dower charge for six hundred dollars.

The deeds and possession thereof respectively to be delivered April 1st, 1897.

The only remaining assets which came into the hands of the accountant was the sum of four hundred dollars received as rent of No. 1 or the mill property and for which the accountant has properly accounted.

The law is well settled that rents belong to the liens in the order of their priority and therefore the four hundred dollars received by the assignee as rent of the mill property or parcel No. 1 must be added to the $5,000.00 received as purchase money therefore, making the fund fifty-four hundred ($5 400.00) applicable to the liens thereon. No rent was received from parcel No. 2.

The real estate realized an amount utterly inadequate to pay the liens and in fact No. 1, an amount insufficient to liquidate the principal of the dower fund and the interest of arrears thereon. No. 2 realized an amount not sufficient to pay the judgment of Catharine Metzler, the first lien, the amount due thereon being for principal and interest $590.00, costs $26 35, attorney's commissions $29.50.

It was agreed by counsel that the most equitable method of settling the expenses of the estate and costs of audit would be a pro rata based on the amounts realized from the several purparts.

Your Auditor therefore finds that the expenses including the awards herein made to the insurance companies, aggregate $425.18 and the costs of audit as hereinafter itemized $80.50, in all $505.68, which he apportions between parcels Nos. 1 and 2 as follows:

To be borne by No. 1, $455.12, and by No. 2, $50 56, deducting this from the totals belonging to the funds respectively, leaves a balance in No. 1 $4,944.88, and a balnce in No. 20 f $549.44.

This latter amount is awarded to Catherine Metzler's revived judgment entered to No. 452, January Term, 1892, and distributed pro rata between the principal and interest, costs and attorney's commissions in the following proportions: To Catherine Metzler, for debt and interest $501.93, to Andrew Dellone, Prothonotary, costs, $22.41, to George W. Heiges, attorney s commissions, $25.10.

There remains the fund arising from the sale of parcel No. 1 and the rent thereof to be awarded.

Mr. Spangler on behalf of the administrator of Anna Mary Emig claimed on the final argument that it should be awarded prorata between the persons entitled to the principal of the dower fund and his client, whose claim is for arrearages of interest thereon.

Mr. Trimmer, and he is joined by Mr. Heiges, contends that the principal of the dower fund is a superior lien to that of the interest on such dower fund and must be paid in full before arrearages of interest are entitled to any part, and that the interest of Martin Emig in the principal of the dower fund is real estate, and his one-sixth part of the principal is subject to the lien of the judgments against him in the order of their priority; and the judgment of Catharine Metzler being the first judgment lien, should be awarded in full as to the balance due thereon not realized from parcel No. 2, before any award is made to the dower fund or the interest thereon, and any balance then remaining out of the said one-sixth interest of Martin Emig in the principal of said dower fund must be awarded to Louisa Smyser on her judgment entered to No. 490, January Term, 1893, it being the second judgment lien against assignor. And further, that the other shares of the principal of the dower fund to the several children of George B. Emig, deceased, except the share of Henry Emig, which Mr. Trimmer claims, on attachment executions No. 49 and 51 of April Term, 1896.

And they further claim that Anna Mary Emig, the claimant's intestate, has been guilty of laches in not enforcing her rights by distress, or otherwise, and cannot assert a claim to the prejudice of the rights of the persons interested in the principal sum.

This case is an unusual one presenting a state of facts and questions of law which counsel and Auditor have failed to meet in any decided case. We have here a property which has depreciated over sixty per cent. and when sold yields less than

the dower originally charged thereon with a few years accumuleted interest, and the right to the sum realized furnishes the legal proposition raised in the case.

Your Auditor finds as a matter of law that upon the acceptance of purpart No. 1 B, of his father's real estate by Martin Emig, subject to the dower charge of $4,817.72, the share of said Martin Emig in the principal thereof to which he would be entitled after his mother's death, was extinguished by operation of law, became an estate in land and not a lien for money and merged in his greater estate in fee for as to his share his was the hand both to re-pay and to receive; Erb v. Huston, 18 Pa. 369; Steckel, Admr., v. Koons, 102 Pa. 493; Reigel v. Seiger, 2 P. & W. 340.

These cases decide that a son who accepts real estate of his father has nothing to pay or to receive as to his share of the principal of the dower but being in his own hands, it is paid presently by operation of law; and where the Sheriff sells land so charged with dower he has no right to annex a condition creating a lien in favor of the judgment debtor so as to enable the debtor to recover the money. Now if the judgment debtor cannot recover the share how can his creditors recover. And does an assignee's sale of his assignor's estate in realty differ so materially from a Sheriff's sale of the same realty that in the one case a purchase takes the entire interest, and the estate of the defendant in the execution, and the other only a part of such estate, your Auditor cannot so view it.

Again, in Steckel, Admr., v. Koons, supra, it was held that where a son of decedent takes a conveyance from another of the decedent's heirs of land so charged without reservation the interest of both the vendor and vendee in the principal sum so charged, is paid by operation of law and cannot be collected from the purchaser thereof after the widow's death.

Your Auditor is of the opinion and finds that the purchase price of $5,000.00 realized from the sale of the entire interest and estate of Martin Emig constitutes a single fund and the share of Martin Emig in the principal sum does not exist as a separate thing upon which any lien would attach separately from such lien on the realty itself but constitutes part of an integral whole, and is distributable to the dower charge.

The question as to the laches of the widow has no merit. Your Auditor is not aware of any Act of Assembly or rule of law which compels a prior creditor to enforce a claim for interest against a debtor the non-enforcement of which might or would prejudice subsequent creditor's rights, If this were so, a first mortgagee could be compelled by a subsequent creditor under penalty of losing to collect, not only his interest promptly but his principal as well if due.

The remaining question now is how shall the net fund derived from parcel No. 1 be awarded.

Is the principal of the dower fund superior as a lien to the interest accrued thereon? Is the interest superior to the principal? Or do both principal and interest stand upon an equal footing?

Your Auditor finds that the net sum realized from parcel No. 1 is distributable pro rata between the five heirs of George B Emig (excluding Martin Emig) based upon the amounts due them respectively December 2nd, 1895, with interest thereon to April 1st, 1897, and the claim of the administrator of Anna Mary Emig, deceased. The share coming to Henry Emig being by your Auditor awarded pro rata to attachment executions Nos. 49 and 51, April Term, 1896.

The following exceptions were filed by the administrator:

The Auditor erred in not awarding Samuel Harlacher, administrator of Anna Mary Emig, deceased, interest on interest (compound interest) on the annual installments of dower interest as they annually fell due; thus awarding a dividend on $1,628 86 instead of $1,349 00.

On behalf of the heirs the following were filed:

1. The Auditor erred in distributing the net balance in hand of the proceeds of parcel No. 1, of the assignor's real estate sold, pro rata, between the administrator of Anna Mary Emig, deceased, widow of Geo. B. Emig, deceased, and the heirs at law of said Geo. B. Emig, deceased.

2. The Auditor erred in not awarding the whole of the net balance of the proceeds of parcel No. 1 in hand to the heirs of Geo. B. Emig, deceased, and their legal representatives.

3. The Auditor erred in awarding

part of the fund in hand to Samuel Harlacher, administrator of Anna Mary Emig, deceased.

4 The Auditor erred in awarding the share of Martin Emig in the dower fund charged on No. 1 of assignor's real estate to his brothers and sisters and the estate of his mother, instead of his judgment creditors.

5. The Auditor erred in not awarding the net balance of Martin Emig's share of the dower fund to Louisa Smyser, judgment creditor.

6. The Auditor erred in not awarding to Eliza Smyser, attachment execution creditor, on her attachment executions against Henry Emig, the sum of $867.18, in the aggregate, instead of $754.71.

7. The Auditor erred in not awarding to Louisa Smyser, on her judgment against Martin Emig, the sum of $696.53.

E. W. Spangler for widows's administrator.

D. K. Trimmer for heirs.

January 3, 1898. BITTENGER, P. J.— The material exceptions in this case are to the distribution by the Auditor, in making a pro rata distribution of the fund between the heirs of George B. Emig, deceased, claiming their shares under the acceptance by Martin Emig, of a portion of his father's real estate, and a recognizance in this Court for his compliance with the decree of the Court; and the administrator of Anna Mary Emig, the widow of said George B. Emig, (who was deceased before the assignee's sale of the real estate,) who claimed for arrears of interest on her dower. It is strenuously claimed by the exceptant that the real estate producing the fund, having sold for a sum insufficient to pay the lien on the property for the heirs at law of said George B. Emig and the arrears of interest, that the whole amount payable to the heirs at the death of the widow, should have been awarded them, including Eliza Smyser, the attaching creditor of Henry Emig, who has attached his share; to the exclusion of the administrator of the widow, who in her life time could not touch or trench upon the principal fund, to any extent; and that her administrator cannot do so.

It is clearly decided by a long line of authorities that the widow's statutory dower is an estate and interest during her life and not merely a lien. Her estate cannot be divested by any judicial sale during her lifetime, on any mortgage or judgment not prior to the death of her husband. The widow is entitled to arrears of interest due and unpaid at date of a judicial sale of land in which she has such estate, out of the proceeds of sale.

After the death of the widow the estate or interest, as it was created by the law and decree of Court, becomes merely a lien which is discharged by a judicial sale, and the shares of the heirs named in the decree are payable out of the proceeds of sale; Riddle v. Penock, 37 Pa. 177, recognized in Bailey v. Commonwealth, 41 Pa. 476.

The heirs in this case accepted notice of the sale by their counsel. They also appeared, before the Auditor, demanding their respective shares out of the proceeds of sale. Mr. Trimmer representing the attaching creditor of Henry Emig also appeared and claimed the share of said heir. They must therefore be held as estopped from denying that the lien is discharged by the assignee's sale. An assignee's sale, under the Act of 17th of February, 1876, P. & L. Dig., page 200, pl. 7, affects liens in the same manner as when the lands are sold by the sheriff under a *venditioni exponas;* Burkholder's Appeal, 94 Pa. 522.

Did the learned Auditor err in holding that the claims of the heirs and the attaching creditor of Henry Emig's share, and the administrator of Anna Mary Emig, the deceased widow, were equally entitled to participate in the distribution, and in awarding the net balance for distribution *pro rata* to said heirs and the said attaching creditor of one of them, and the administrator of the widow? This is the material point of the controversy. Was the right of the said widow's administrator well established by the decisions, to claim arrears of dower interest out of the proceeds of judicial sales, qualified by the fact that there was not sufficient to pay the heirs and said administrator in full, so that therefore said administrator can receive only what is left after payment of the lien created by law and which exists in favor of the heirs, entitled at the death of

the widow, or those representing or entitled to their shares.

Where no mortage intervenes, as in this case, the arrears of dower, capable of ascertainment, are divested and thrown upon the fund produced by the sale It is the duty of those interested to see that the property sells for sufficient to cover such arrearages; Davidson's Appeal, 95 Pa. 394.

There is no proof of notice having been given at the assignee's sale, of arrears of dower being due. The heirs, except those whose shares had merged in their respective fees, in the absence of notice had a right to believe that the proper payments of interest had been made or released. They were, therefore, only interested in having the property sell for sufficient to cover the amount of their respective interests in this dower fund, payable at the death of their mother; and the properties were sold accordingly for a sum insufficient for the payment of the fixed lien and arrears of dower.

Are they, after having thus been misled by the silence of the administrator, to be compelled to lose a portion of their respective shares secured by the lien created by law and the action of the Court, at the acceptance of the real estate, by Martin Emig?

Must not this fixed lien be first satisfied, and the administrator of the widow be confined to the balance remaining after the payment of the fixed lien?

We think this question is answered in favor of the heirs and their representatives, and against the administrator of the widow in Tospon v. Sipe, 116 Pa. 588, wherein it is said, in the opinion, on page 598, that the rule that the unpaid interest attaches to and becomes part of the principal, does not apply, because it is not due to the same persons nor in the same right; the interest belongs to the widow; the principal belongs only to the heirs, and they cannot have it until after her death. She has not and never can have a right to any part of the principal.

If the widow can never have any right to any part of the principal, how can her administrator? Especially without proof of notice at the Sheriff's sale, to enable the heirs to protect themselves? In such a case the principle that the loss should fall on him who by reasonable diligence could have protected himself, applies.

We think the Auditor erred in not awarding to the children of Geo. B. Emig entitled to shares in this fixed lien created for the benefit of the widow, during life, and the children or their representatives at her death, their full respective shares, and to the widow's administrator any balance remaining instead of distributing the balance *pro rata* between them.

We are also of the opinion that the first exception must be sustained. Notwithstanding the fact that counsel for both plaintiff and defendant have submitted calculations, we are not able to understand the Auditor's conclusions and the data upon which he ruled in the matters embraced in this exception.

The Auditor's report is set aside, and the matter is recommitted to him to find the facts stated as not found in the first exception, and to report a distribution in accordance with this opinion.

Emig's Assigned Estate, No. 2.

Dower—Arrears of interest—Res adjudicata.

The Auditor, whose report was recommitted, was ordered to find certain facts and distribute the balance agreeably to the Court's opinion filed. At the meeting counsel for one of the claimants offered evidence (opposing counsel objecting and withdrawing) to prove notice of claims at the time of the sale. The Auditor treated the evidence as not having any effect upon his report and distributed the balance according to the Court's decree. On exceptions filed, HELD, that the exceptions must be dismissed.

The Auditor was confined to the decree of the Court.

Emig's Assigned Estate, supra 178, confirmed.

There is no allegation that this evidence could not have been produced at the first audit and was not then within the knowledge of the exceptant. The exceptant cannot take his chances for a decree in his favor, and when he has failed review the action of the Court in this manner.

The matters excepted are *res adjudicata*.

Exceptions to Auditor's report.

The report of the Auditor is in substance as follows:

That pursuant to the decree of your Honorable Court filed January 3rd, 1898, sustaining exception and recommitting the former report of your auditor to him for correction in accordance with its order and opinion, your auditor met the counsel interested at the office of E. W. Spangler, Esq. Before the taking of any testimony, D. K. Trimmer, Esq., on behalf of his clients, objected to the taking of further

testimony and then retired. After his withdrawal, Mr. Spangler called Samuel Harlacher, and proved by him that within thirty days after the assignment of Martin Emig had been executed and delivered, he had a conversation with D. K. Trimmer, Esq., attorney for Eliza Smyser and Louisa Smyser, in which he informed him that dower interest was due Mrs. Anna Mary Emig and had not been paid for between four and five years, but stated no exact figures or amount, said it was from April first, 1891.

Witness also testified, that he informed Albert Smyser and Jacob Smyser, agents for Eliza and Louisa Smyser, at the time of the Sheriff's sale of the assignor's personalty, some eight months prior to the sale of the real estate, and also at the sale of the real estate before the sale took place, that he, as administrator, expected to collect the interest from April 1st, 1891. This testimony is uncontradicted. The auditor's notes thereof are filed herewith.

Mr. Spangler has requested your auditor to find:

1. That the widow is entitled to compound interest, that is, interest on the annual installments as they fell due. Your auditor is of the opinion that this is correct, and would have allowed such interest in his first report, had he not, perhaps mistakenly (?) understood that such claim was waived. The amount due the widow at her decease with interest to the date of the confirmation of the sale, when so calculated, is $1,628.86.

2. That the interest is but part of the substance of the debt and shares with it in the distribution.

3. That no notice of the amount of dower charged or interest due thereon is necessary to be given at a judicial sale, or prior thereto, to lien creditors.

4. That a broad distinction exists between Topson v. Sipe, 116 Pa. 588, cited by the Court in its opinion and the case in hand.

No matter what your auditor's opinion may be on the several legal propositions so stated, he has but one duty to perform under the following decree of the court:

"And now, January 3, 1898, the auditor's report is set aside, and the matter is recommitted to him to find the fact stated as not found in the first exception, and to report a distribution in accordance with this opinion."

The awards made in the first report (as well as the pro rating of the expenses in the first report) out of the fund realized from parcel No. 2 have not been disturbed by the court and therefore your auditor awards out of said sum and generally out of the balance as follows: To the Farmers Mutual Fire Insurance Co., of Dover, the sum of $10.45; to the Codorus and Manheim Insurance Co., $5.25; to Catharine Metzler, plaintiff, in judgment 452 January Term. 1892, $501.93; to Andrew Dellone cost on said judgment, $52.41; to George W. Heiges, Esq., attorney's commissions thereon, $25.10.

As we understand the opinion of the Court, the principal of the dower fund charged on No. 1 of assignor's real estate shall first be paid out of its proceeds (except assignor's own share which is merged in his greater estate) with interest from December 2nd, 1895, the date of the widow's death, to April 1st, 1897, the date of confirmation of sale, before awarding anything to the widow's administrator on the amount due her and unpaid at her death, which with its interest as herein before found is $1,628.86.

The total dower charge is $4.817.72 and there are six distributive shares, which makes each share of principal $802.95, to which must be added the interest from death of widow, December 2, 1895, to April 1st, 1897, sixteen months, amounting to $64.23, which added to the principal of the share furnishes a total of $867.18 for the share of each heir.

Your auditor therefor awards to Jacob Z. Emig, $867.18; to Sarah Ann Grove, $867.18; to Ann Harlacher, $867.18; to Edward F. Emig, $867.18, and the share of Henry Emig is awarded to the attaching creditor Eliza Smyser on attachment No. 49, April Term, 1896, $354. D. K. Trimmer, Esq., attorney's commissions thereon $17.68, and to Eliza Smyser on attachment of execution 51, April Term, 1896, $472, and to D. K. Trimmer, attorney's commissions thereon $23.50.

After making these awards of the five distributive shares there remains the sum of $588.98 which is awarded to Samuel Harlacher, administrator of the estate of Anna Mary Emig, deceased.

The following exceptions were filed:

1. The Auditor erred in awarding to Samuel Harlacher, administrator of Anna Mary Emig, deceased, only $588.98.

2. The Auditor erred in awarding to Jacob Z. Emig, Sarah Ann Grove, Anna Harlacher and Edward F. Emig each the sum of $867.18 and to Eliza Smyser $472.00 and $354.00, and $41.18 to D. K. Trimmer, Esq.

3. The Auditor erred in not awarding the sum of $4 924 88 pro rata to the dower interest of $1,628.86, due Samuel Harlacher, administrator of Anna Mary Emig, deceased, and $867.18 dower principal and interest awarded to Jacob Z. Emig; $867.18 to Sarah Ann Grove; $867.18 to Anna Harlacher; $867.18 to Edward F. Emig; $826.00 to Eliza Smyser and $41.18 to D. K. Trimmer, Esq.; and in not awarding a dividend 82.57 per cent. to each pro rata as follows: Samuel Harlacher, administrator of Anna Mary Emig, $1,345.10; Jacob Z Emig, $716.12; Sarah Ann Grove, $716.12; Anna Harlacher, $716 12; Edward F. Emig, $716.12; Eliza Smyser, $682.12, and D. K. Trimmer, Esq., $34.00.

E. W. Spangler for exceptions.

D. K. Trimmer, contra.

March 26, 1898. BITTENGER, P. J.—By the decree of this Court, under the Act of Assembly, in proceedings in partition in the estate of George B. Emig, deceased, the sum of $4,817.72 was charged upon the real estate of the assignor, the interest whereof was made payable to Anna Mary Emig, widow of said George B. Emig, deceased, annually on the first day of April, during her natural life, and at her death the principal sum to be paid to the six children of George B. Emig, naming them, in equal shares.

The widow died on December 2, 1895, and on February 22, 1896, the real estate was assigned by Martin Emig and wife, in trust for the benefit of creditors of Martin Emig.

Upon the death of the widow the dower fund became a lien on the land *for the use of the heirs and was at once payable to them, according to the decree of the Court.*

The widow's administrator claimed arrears of interest from April 1st, 1891, amounting to $1,349.00.

The Auditor found the proceeds of the sale of the real estate insufficient to pay the lien in favor of the heirs of George B. Emig, which was discharged by the assignee's sale; and after deducting expenses and several awards properly payable, divided the balance *pro rata* between the heirs entitled and the attaching creditor of one of them, on her attachment.

Upon exceptions filed, after argument and due consideration, the Court set aside the report of the Auditor and recommitted the report to the Auditor to find certain facts mentioned in the opinion, and to first award the heirs and the attaching creditor entitled to the share of one of them, the amount due them as their shares of the dower fund, under the decree, and the balance to the administrator of the widow, on account of the amount claimed for arrears of annual interest, in accordance with the opinion of the Court.

At the time of the argument and filing of the opinion, there was no evidence of any notice, at the Sheriff's sale, or before that time, to the heirs of any claim for arrears of interest by the widow's administrator. The heirs were only interested, therefore, (so far as the evidence shows,) in having the property bring sufficient to pay the expenses and the dower fund. Inasmuch as they had no notice of a claim for arrears of interest they could not protect themselves by bidding the property up. This afforded a substantial argument in favor of the right of the heirs to receive their full shares made payable to them by this decree, at the death of the widow; and upon it, was partly based the decision of the Court.

The Auditor was ordered to find certain facts and distribute the balance agreeably to the opinion filed. This was his whole duty, and the extent of his authority. The Auditor, in such circumstances, is confined to the decree of the Court; Wither's Appeal, 16 Pa. 151; Donelly's Estate, 3 Phila. 18; Benson's Appeal, 48 Pa. 159.

At the instance of the counsel for the administrator of the widow, Anna Mary Emig, deceased, testimony was taken by the Auditor before the filing of his amended report, under objection by Mr. Trimmer, the counsel for the attaching creditor of the share of one of the heirs and in his absence, (he having withdrawn from the audit.) The purport of the evidence was to prove actual notice of the claim for arrears of dower interest, to the heirs and the counsel for the attaching creditor of one of them, before the sale.

The Auditor properly treated the evidence as not having any effect upon his report and distributed the balance of pro-

ceeds of sale, for distribution, according to the directions of the Court, in its opinion filed.

Now exceptions are again filed to the report of the Auditor on behalf of the widow's administrator. The act of the counsel filing the exceptions, is an effort to have a rehearing of the matter already decided, after having had his day in Court. If the testimony was important, why was it not furnished to the Auditor and Court at the proper time, before argument? There is no allegation that this evidence was not then within the knowledge of the exceptant, and available. If the matter had been overlooked, why was not time asked for, before the argument, for the taking of the testimony Instead of asking for leave to take testimony or for a reargument, the learned counsel attempts, indirectly, by new evidence and exceptions, to attack and have set aside the decree of the Court. The exceptant can not, in this manner, take his chances for a decree in his favor, and when he has failed review the action of the Court in the manner he has chosen; Kunkle's Estate, 6 YORK LEGAL RECORD 123; Bradford's Appeal, 29 Pa. 513; Dennison v. Goehring, 7 Pa. 402. The matters excepted to are *res adjudicata;* Felty v. Calhoun, 147 Pa. 27; Ahl v. Goodhart, 161 Pa. 455; Shea's Appeal, 121 Pa. 302; Shaw v. Smith, 179 Pa 376; Cassidy's Estate, 6 Pa C. C. R. 627; Rauwolf v. Glass, 184 Pa. 237

The introduction of testimony before the Auditor was clearly unwarranted, and the testimony cannot be considered The exceptions are to matters *res adjudicata*, and must be dismissed. The exceptions are dismissed and the report is confirmed.

ORPHANS' COURT.

O. C. of Montgomery Co.

Engle's Estate.

Trust—Absolute estate.

The estate of a trust is entirely consistent with the bequest of an absolute beneficial estate. It is not contradictory of the estate but a mere qualification of its use, and only establishes a new and consistent relation.

Sur petition of Mahlon H. Engle for an order on Thomas G. Rutter, testamentary trustee to pay over certain trust funds.

Gotwalts & Saylor for petition.

John W. Bickel, contra.

April 1, 1898. SWARTZ, P. J.—Solomon K. Engle died in 1868. His will was made in 1866. At the death of the testator, the petitioner, Mahlon H. Engle, was about twenty-three years old. The will appoints Thomas G. Rutter trustee for Mahlon. The trustee has in his hands $1,259.16. The interest or income of this fund was annually paid to Mahlon for a period of twenty years. Mahlon, at this late day, claims that the will not only gives him an absolute interest in this fund but also contends that the principal sum is payable to him.

In the depositions taken, to show the surrounding circumstances under which the will was made it is shown that the present application was filed to prevent the legacy from passing to any other persons than the family of the petitioner. If this was the sole purpose of the applicant the intervention of the court is unnecessary, for in Engle's Estate, 180 Pa. 215, it was decided that the children of Solomon K. Engle take an absolute estate in their respective legacies. The will creates a trust as to the corpus of the legacy of Mahlon H. Engle, and at his death the legacy passes to his legal representatives for distribution to his heirs.

We think it is clear that the five hundred dollars can not be paid to Mahlon unless the trust finds that the conditions on which it was to be paid have been complied with on the part of Mahlon.

Whether the time for the performance of these conditions has expired is a question we need not now decide. It is sufficient to say that the evidence taken discloses wise and discreet action on the part of the trustee. The testator did not have full confidence in the ability of his son to care for the money, and he entrusted the matter to one in whom he had confidence.

There was also an active trust as to the balance of Mahlon's share. The will, as well the as the circumstances surrounding the testator when the will mas made, show that the father did not wish the son to control the fund, but that the trustee should hold the corpus for the benefit of the legatee. The son was twenty-three years old, and the drink habit was upon

him. The father knew the son's weakness, and the last words of the testator indicate a fear that the trustee may be too indulgent to the son.

The trustee had active duties to perform which required judgment and discretion. He was to invest the share in real estate, and if he thought it "right and proper" he might allow the beneficiary of the trust to occupy such real estate.

As to the share over and above the five hundred dollars there was at first an absolute gift and no bequest over. The testator intended that the gift should vest absolutely in Mahlon as a beneficial estate, but the discretionary power vested in the trustee created a valid restraint upon its use. The creation of a trust is entirely consistent with the bequest of an absolute beneficial estate. It is not contradictory of the estate but a mere qualification of its use, and only establishes a new and consistent relation; Ivory v. Burns, 56 Pa. 300; Kreb's Estate, 184 Pa. 222; Boies's Estate, 177 Pa. 190.

The corpus of the estate vested in Mahlon with full power to dispose of the same by will or otherwise, to take effect after his death; Boies's Estate, *supra;* Sproul's Appeal, 105 Pa. 438; Millard's Appeal, 87 Pa. 457. It follows we can not allow the money to be paid over to Mahlon; the sole purpose of the trust was to protect the fund against Mahlon's improvidence. The trust was made for his benefit so that the fund might remain intact and provide for him the support needed during his life. Upon his death it will pass as part of his estate; Millard's Appeal, *supra.*

The rule on the trustee to pay over funds in his hands is discharged.

SUPERIOR COURT.

Price v. County of Lancaster.

Constables' fees— Subpoenas— Mileage— Construction of statutes.

A constable is entitled to fifty cents for serving a subpoena on each witness named therein, and ten cents per mile one way for mileage in serving subpoenas on warrants.

Where in items in a fee bill as to mileage, it is not specified whether direct or circular, but in similar items in a former fee bill the word "circular" is used, and is also used in other items of the later bill, it is presumed that mileage direct or one way was intended in the items first mentioned.

Any doubt as to the intention of the Legislature in fixing the compensation of the constable should be resolved in favor of the public.

Appeal of the County of Lancaster defendant, from the judgment of the Court of Common Pleas of Lancaster county, on a case stated.

The case stated set forth that the plaintiff made an arrest on a warrant for larceny as bailee, and in so doing necessarily traveled two miles circular, and also subpoenaed two witnesses and in doing so necessarily traveled two miles circular.

The court below in their opinion allowed for this service ten cents for each mile traveled, or 40 cents mileage, and 50 cents for serving the subpoenas on the two witnesses, which with the dollar for the warrant amounted to $1.90, and entered judgment for this amount.

Whereupon the defendant took this appeal, assigning for error the above action of the court.

Thomas Whitson and *Brown & Hensel* for appellant.

T. J. Davis and *H. M. Hauser* for appellee.

November Term, 1896. WICKHAM, J. —The plaintiff, who was a constable of the City of Lancaster, on June 13, 1896, executed a warrant issued by an alderman of the city against one charged with the crime of larceny by bailee. In performing this duty, the officer necessarily traveled two miles circular, *i. e.*, one mile going to the place where he made the arrest, and the other in taking the prisoner to the alderman's office. Later he served a subpoena on two witnesses, to appear at a hearing, and in so doing, traveled two miles circular.

For these services he is entitled to compensation, under the Act of 23 May, 1893, P. L. 117, and the questions presented by the case stated are first, can the plaintiff legally claim circular mileage for executing the warrant and serving the subpoena; and second, can he recover fifty cents for subpoenaing each witness. The Act of 1893, owing to some obscurity in regard to the matters here under consideration, has been productive of trouble in most, if not all, of the counties of the Commonwealth. The decisions as to its meaning, only some of which have been published, rendered by the Common Pleas judges, are so conflicting that they tend as much to confuse as to enlighten. Any of the

constructions adopted are, however, capable of being plausibly sustained by argument, or of being condemned in like manner. We therefore perform the duty devolving upon us with some diffidence, and not without due respect to the opinion of the courts of first instance.

The Act of 1893 provides for the following fees, to wit:

"Serving subpoena"	.50
"Traveling expenses on an execution returned *nulla bona* and *non est inventus*, where constable has been at defendant's last residence, each mile"	.10
"Traveling expenses in all other cases, each mile"	.10
"Executing order for the removal of a pauper"	.75
"Traveling expenses in said removal each mile circular"	.15

In considering the first question, it will be observed that the Legislature knew and took full cognizance of the well established difference between circular mileage and mileage one way. This appears from the use of the word circular in the item fixing the compensation for travel ing expenses for removing paupers. The omission elsewhere of the word is, there fore, very significant, more especially so in view of the fact that it was employed in fixing the compensation for serving subpoenas in the general fee bill act of 2 April, 1868, P. L. 3, repealed as to the fees of constables, aldermen and justices of the peace, by the Act of 1893. We are of opinion that the plaintiff is only entitled to pay mileage, one way, at the rate of ten cents per mile. It seems hardly probable that the Legislature intended to increase the mileage from six cents circular, the compensation fixed by the Act of 1868, to ten cents circular, as claimed by the plaintiff, particularly since the fee for serving subpoenas has been so largely enhanced. Any doubt of the subject should be resolved in favor of the public.

As to the second question, we think that for serving a subpoena the constable may, for each person named in the process and actually served, legally charge fifty cents. The words of the Act of 1868 relating to this matter, are as follows: "Serving subpoena, 15 cents." It will be seen that, except as to the amount of compensation, the same phraseology is found in the act of 1893. So far as we have been able to learn, the universal practice throughout the Commonwealth, under the the Act of 1868, was as to allow the fee for each witness served. Like local effect was given to special acts, containing similar language, but fixing a larger fee, passed from Philadelphia to Delaware counties. This seems only just. Witnesses may reside far apart in the country, and sometimes when matters of character or opinion are involved, a score or more persons are called on to testify. To hold that the officer shall be given only the same fee in every case, for serving the parties named in the subpoena, would produce inequality and injustice, and often subject him to the temptation to shirk the full performance of his duty. Practically he serves the writ every time he reads it to a witness. The trouble and labor is the same as if he had a separate subpoena for each person named. The construction, applied to the Act of 1868 and the local statutes referred to, is entitled to considerable weight in deciding the present case, as it evidences the view of the bar and to some extent the bench, of the State, as to the meaning of words exactly similar to those we are now called on to construe.

The case of Wilhelm, Sheriff, &c., v. Fayette County, 168 Pa. 462, is somewhat analogous to the one in hand, so far as the question now under consideration is concerned. There the decision turned on the interpretation of the following words in the Act of 1868, "Fee on commitement for any criminal matter, 50 cents." It was contended, in behalf of the defendant, that the Sheriff was entitled to only one fee of fifty cents, no matter how many persons were named in the commitment. The Supreme Court, however, sustaining the Court below, held that the officer could legally claim fifty cents for each person received on the one process.

As the judgment on the court below, in the case before us, is not in harmony with the views here expressed, it cannot be sustained. It is, therefore, reversed and judgment is now entered for the plaintiff and against the defendant, for the sum of two dollars and twenty cents.

COMMON PLEAS.

C. P. No. 2 of Allegheny Co.

Fletcher v. Fletcher.

Divorce—Respondent—Costs.

In divorce attachment will not be granted against respondent, directed to pay costs, without explicit allegation that he is of sufficient financial ability to pay same.

Averment in the petition that the respondent is a "physically strong and robust man, capable of earning good wages," and in a stated employment "is earning and receiving good wages," is not sufficiently specific for an attachment. It should show affirmatively respondent's ability to pay.

Dibitatur: As to the court's power to compel payment of court costs by attachment even where respondent is shown able to pay.

In divorce. Rule for attachment.

Charles W. Bobb for rule.

Thos. J. Keenan, contra.

April 12, 1898. FRAZER, J.—In this case a decree of absolute divorce was granted and the respondent directed to pay the costs of the proceedings. Having failed to do so, upon petition of libell ant's attorney, setting forth that the decree divorcing libellant from the respondent would not be entered of record in the office of the prothonotary until the costs incurred in the case were paid, that libellant was unable to pay the same, and that the respondent is a "physically strong and robust man, capable of earning good wages, and is employed by one Joseph Veach, of Allegheny City, and in said employment is earning and receiving good wages," a rule was granted on respondent to show cause why an attachment should not issue against him for failure to pay the costs as required to do by the decree. This rule was served on respondent but no answer was made thereto.

We think this rule ought to be dis charged because there is no explicit allegation in the petition that the respondent is of sufficient financial ability to pay the costs taxed in the case.

The averment that petitioner is informed and believes that respondent is earning and receiving good wages is not suffi ciently definite. The petition should go further and set forth the nature of the employment and at least approximate the amount of the wages received weekly or monthly by the respondent. The petition should show affirmatively that the respondent is able to pay.

The failure to show this is fatal and the rule must be discharged.

Even if it had been shown in the petition that the respondent is sufficiently able to pay as required by the decree, we very seriously doubt our power to compel the payment of the court costs taxed in the case by an attachment against the respondent, however that question will be considered when the respondent's ability to pay is shown.

Rule discharged without prejudice to libellant to file another petition.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Power of city to increase its debt without assent of electors.—On January 1st, 1874, the net debt of Lancaster, a city of the third class was $410,100, and its present debt is $644,500. Since 1874 there was added to the city's indebtedness $638,000, and paid thereon $204,200, and $205,900 was paid on the indebtedness incurred prior to 1874. Of this increase $275,000 was with the assent of the electors. Two per cent. of the city's assessed valuation amounts to $308,332.92 It was proposed by the city to add $42,000 to the indebtedness of the city without the assent of the electors, to prevent which a bill for injunction was filed by certain citizens and tax-payers. The plaintiffs in the injunction proceedings maintained that the increase of the city's debt since 1874 was the difference between the said sum of $638,000 and the said sum of $204,200, or $433,800, which exceeded the two per cent. limit and could not be reduced by deducting the said sums of $205,900 or $275,000 therefrom The city maintained that the increase should be computed by substracting from the said sum of $644,500, either the said sum $410,100, or both the said sum of $204,200 and the said sum of $275,000, by either of which methods the margin within the two per cent. limitation would be shown to be more than enough to cover the proposed loan. HELD, that the position of the plaintiffs was the correct one, and the injunction should be made permanent.—*Houston et al. v. City of Lancaster*, (Lancaster C. P.) 15 Lancaster Law Review 177.

York Legal Record.

Vol. XI. JUNE, 1898. No. 12.

SUPERIOR COURT.

Heartzog's Appeal.

Ejectment—Estate for life—Gift—Statute of Frauds.

Plaintiff in an action of ejectment claimed title by virtue of a bequest by a will. Defendant, in possession, claimed by a parol gift from testator in his lifetime. There was no proof of valuable improvements or long continued possession. The Court below instructed the jury to find for the plaintiff. HELD, not to have been error.

The defendant's title was based on an alleged parol gift or lease of the land, for life. Under the Statute of Frauds, a parol gift, if proven, has only the force of a tenancy at will, unless in addition to the parol gift, there is shown a continued possession, and the making of valuble improvements, such as cannot be adequately compensated in damages.

The defendants in the possession at the time of the service of the writ, none of them having disclaimed of record, were incompetent to testify to the matters of the offers, Henry Heartzog, the other party to the contract, being deceased, and the plaintiff claiming under his last will and testament.

Appeal from the decree of the Court of Common Pleas of York County.

The plaintiff's history of the case sets forth the following facts:

This was an action of ejectment, to recover the possession of a certain house and lot of ground described in the plaintiff's writ.

Henry Heartzog died on November 3, 1893, leaving his last will and testament in which he bequeathed all his property real, and personal and mixed to his niece Sophia Heartzog "to live upon and enjoy the income, rents, dividends and interest accruing thereon during her life," and thereafter to other devisees named therein. Among the properties devised was the house and lot in dispute, which was given to Eugene Borgel, a son of Louisa Borgel, one of the defendants in this case.

Sophia Heartzog, plaintiff, and Lousia Borgel, one of the defendants, are sisters and nieces of Henry Heartzog, the decedent.

During the winter and spring of 1893, Henry Heartzog, who was then living, and the owner in fee simple of the said property in question, came to Louisa Borgel and repeatedly requested her to move into and occupy the house in question. Finally about April 1, 1893, a verbal agreement was made between the said Henry Heartzog and Louisa Borgel, defendant, whereby the said Louisa Borgel in consideration of her past services to Henry Heartzog and in consideration of her keeping the said property in proper repair, paying the taxes and water rent, was to have sole use, occupancy and possession of the real estate for and during the period of her natural life. That in pursuance of said agreement she the said Louisa Borgel with her children, Eugene and Mary, went into possession of the said premises during the lifetime of Henry Heartzog and has so remained in undisputed possession up to the time of the bringing of this suit April 3, 1896, and still retains possession of the same.

Louisa Borgel at the time she took possession, at the request of said Henry Heartzog, of the property in question, gave up another property she had possession of, at considerable inconvenience and expense. That she has up to the present time fully complied with the stipulations imposed upon her.

Subsequent to the death of Henry Heartzog, the said agreement, by which Louisa Borgel got possession of the property in question, was ratified by said Sophia Heartzog, who knew the terms of the original agreement between Henry Heartzog and defendant Louisa Borgel, the said Sophia Heartzog having herself acted in part for Henry Heartzog in the making of said agreement, and subsequent to the taking possession of the property in question by Louisa Borgel, Henry Heartzog himself reaffirmed said agreement, declaring that the said Lousia Borgel should continue in possession of the property during her natural life, upon the said terms.

Both parties therefore claim title under the decedent, Sophia Heartzog, the plaintiff, by virtue of the will of decedent, and Louisa Borgel, one of the defendants, by virtue of a parol gift for life, from the decedent in his lifetime, with the full knowledge of the plaintiff Sophia Heartzog. The other defendants make no claim to said property.

The Court below charged the jury as follows:

Gentlemen of the Jury:—This is an ac-

tion of ejectment, brought by Sophia Heartzog, the plaintiff, against Louisa Borgel, Eugene Borgel and Mary Borgel, the defendants.

The defendants it seems were all in possession of this property at the time this writ was served, although one of them, Eugene Borgel, has since moved away from the premises. This writ was served upon all of them

The plaintiff claims to recover in this case "a lot of ground situate in the Third Ward of York City, on West Philadelphia street, north side, adjoining other property of the plaintiff on the east and north, property of John Boreland's estate on the west, and said West Philadelphia street on the south, being sixteen and one-half feet in width on said street, and 78 feet in depth, on which is erected a two story brick dwelling house." It seems that this is a three story brick dwelling house, as shown by the proof. That is not material, as it is the only lot in dispute,—the lot of ground upon which it is erected.

The plaintiff in this case has produced in evidence a deed conveying this property in 1848, to Henry Heartzog, the decedent; and then the will of Henry Heartzog willing her this property for life, among the other properties,—all his estate,—during life. And she also offered in evidence the Sheriff's return, to show who was in possession at the time the suit was brought.

Defendants defend upon a claim of title, derived from this Henry Heartzog in his lifetime,—an agreement on his part that she (Louisa Borgel) should have it for life, after he executed his will,—that he made an aggreement of that kind: and attempted to prove it by oral testimony; but the Court ruled that the testimony was not admissible. I should have said that the testimony offered was not admitted because the witnesses who were called were interested parties, who could not testify against the will of the testator, he being deceased; and this was particularly so in reference to one of the defendants, she attempting to prove that state of facts and circumstances which were not allowable; and the Court found it necessary to rule that the offers were not admissible, for the reason that she did not make out such a case as in law gave her title either to life estate, or a right to possession of the premises during her life. Therefore there is no evidence before you in this case for the defendants and your verdict must be for the plaintiff for the land described in the plaintiff's writ.

The jury will therefore find a verdict for the plaintiff, and against the defendants, for the land described in the plaintiff's writ.

Subsequently a motion was made for a new trial, which was refused by the Court below, Bittenger, P. J., and the following opinion filed:

The reasons assigned for a new trial are the rejection of the offers of the defendant's evidence and the direction of the court, to the jury, to find for the plaintiff.

The evidence offered by the defendants was all to prove in Sophia Heartzog an estate for life, granted to her, by parol, by Henry Heartzog, now deceased, from whom the plaintiff claims title, by his last will and testament.

Notwithstanding the urgent and ingenious argument of the counsel for the plaintiff, that the estate claimed and described in the offers is a parol lease for life, we adhere to our opinion formed at the trial, that the estate proposed to be proved is a parol gift for life.

Blackstone's definition of a lease, 2 Bl. Com. 317: "A conveyance of lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years or at will, but always for a less time than the lessor hath in the premises," cannot be improved, and is virtually adopted by Anderson in his Dictionary of Law, page 606, as follows: "A contract for the possession and profits of land and tenements on the one side, and a recompense of rent or other income on the other; in other words a conveyance to a person for life, or years, or at will, in consideration of a return for rent or other recompense."

In the offers of the defendant there was no mention of an annual rent or recompense; nothing to be paid except taxes and water rent (these not to the grantor, but to those claiming or collecting same.) This was only imposing the usual burdens on life tenants. If the defendant has any estate, whatever, it is clearly a parol life estate.

It is not material, however, as in either an estate for life, or a parol lease for life,

the Statute of Frauds declares the estate or tenure void, inasmuch as the same grant is not in writing, and the term offered to be proven is exceeding the three years excepted by the Statute.

The defendants in the possession at the time of the service of the writ, none of them having disclaimed of record, were incompetent to testify to the matters of the offers, Henry Heartzog, the other party to the contract, being deceased, and the plaintiff claiming under his last will and testament. The subject of the offers were not within any of the exceptions of the evidence acts of 1887 or 1891. See King v. Humphreys, 135 Pa. 310.

The matter proposed to be proved by Charles F. Borgel was rejected, because it was to prove only an expressed intention to give, and not a gift; and for the further reason that, admitting the facts proposed to be proven, the evidence was not admissible, for the reason that it was not proved or proposed to be proved either that the defendants made valuable improvements, after taking possession of the premises under the alleged parol gift, which could not be compensated in damages, or had been in long, continuous, uninterrupted possession of the premises. Indeed it was acknowledged by counsel for the defendants, that only some $40.00 had been expended by defendants in improvements, and only a short possession had preceded the commencement of this action of ejectment. There was not such long continued possession and expenditure of money in improvements, as would exempt this case from the operation of the Statute of Frauds.

The clearest evidence of present gift, accompanied by exclusive possession, and valuable improvements not to be compensated in damages, is necessary to establish a valid parol gift; Miller v. Hartle, 53 Pa. 108; Ballard v. Ward, 89 Pa. 358, and cases cited.

Speaking of the Statutes of Frauds and Prejuries, the Supreme Court, in McKowen v. McDonald, 43 Pa. 441, justly says, on page 444, "The maintenance of that Statute, as a rule of property, is a matter of great public concern. In upholding it with a firm hand, as we conceive it is our duty to do, we are sometimes grieved to be obliged to disappoint the expectation of a family, but when we reflect that the law does not suffer labor spent in improvements to go unrewarded, and that its demand for some note in writing to evidence a bargain for real estate, is not an unreasonable or oppressive exaction, the hardship of a case like this dwindles to less than the small dust of the balance; it cannot justify us in placing ourself in opposition to the Statute."

In the case just referred to a son had gone into possession of land upon an agreement with his father had cleared and fenced the land, erected farm buildings, planting an orchard, &c., and yet the Supreme Court held that these improvements were such as could be appraised and compensated in damages, and would not, therefore take the case out of the operation of the Statute.

Having, therefore, determined that the offers proposed by the defendants were not sufficient to take the case out of the operation of the Statute, the offers were properly excluded; and even if the court was in error in holding the defendant incompetent to testify to matters occurring before Henry Heartzog's death, the defendants were not injured and therefore a new trial should not be granted.

We think we were clearly right in rejecting the defendants' offer, for both the reasons just stated, and in directing a verdict for the plaintiff. We must, therefore, overruled the motion for a new trial and discharge the rule.

It is so ordered.

From this decree, the appeal was taken, the errors assigned being the rejection of evidence, and the instruction to find for the plaintiff.

P. J. M. Heindel and *N. M. Wanner* for appellants.

Latimer & Schmidt and *A. N. Green* for appellees.

April 25th, 1898. PORTER, J.—Both of the parties to this ejectment claim a life estate in the property through Henry Heartzog, deceased, the plaintiff under the latter's will and the defendant under an alleged parol contract. The learned Court below excluded several offers of proof submitted on behalf of the defendant, and finally directed a verdict for the plaintiff. The defendant has not been injured by the rejection of the offers of proof, for had the testimony been admitted, it would not in our opinion have sustained a verdict for the defendant. We need therefore not pass upon its com-

petency. The defendant s title was based on an alleged parol gift or lease of the land, for life. Under the statute of frauds, a parol gift, if proven, has only the force of a tenancy at will, unless in addition to the parol gift, there is shown a continued possession, and the making of valuable improvements, such as cannot be ade quately compensated for in damages. This proposition is sustained by many authorities. The defendant here offered to show neither the prolonged possession, nor the making of valuable improvements contemplated by the rule of law.

If the agreement sought to be set up by the defendant be regarded in the light of a parol lease for life, her position is not strenghtened. A parol lease for more than three years is, under the Statute of Frauds, but a tenancy at will, and even a ratification of it must be signified by writing; Dunn v. Rothermel 112 Pa. 272. It was held in Whiting v. Pittsburgh Opera House Co., 88 Pa 100, that the facts that the tenant was in possession and that he made certain improvements in consideration of said lease do not create a sufficient equity to take the case out of the operation of the statute.

The case of Smith v. Tuitt, 127 Pa. 341, cited by the appellant is not in point in as much as that case was "not affected by the Statute of Frauds. because the terms of the agreement are put in writing." The same distinction applies to Tuitt v. Smith, 137 Pa. 35.

We are of opinion that no error was committed by the Court below in entering judgment for the plaintiff, and the judgment is therefore affirmed.

Sechrist's Appeal.

Insurance— Affidavit of defence— Manufacturing establishment.

Plaintiff brought suit on a policy of insurance for the loss of a saw mill and contents. The affidavit of defence alleged that this was a manufacturing establishment and at the time of the fire had ceased to be operated for more than ten days, contrary to a provision in the policy. The Court below refused to give judgment for want of a sufficient affidavit of defence. HELD, not to be error.

The policy also provided that if the building or any part thereof should fall, except as the result of fire, the policy should cease. The affidavit alleged such fall, and the Court below refused to enter judgment for want of a sufficient affidavit of defence. HELD, not to be error.

Appeal from the decree of the Court of Common Pleas of York County.

Suit was brought on an insurance policy. The affidavit of defence filed in the Court below was as follows:

1st. The subject of insurance, as set forth in the plaintiff's statement, was a manufacturing establishment and contents. At the time of the alleged fire said manufacturing establishment had ceased to be operated for more than ten consecutive days. The policy, as recited in said plaintiff's statement, provided that the entire policy shall be void if the property insured, being a manufacturing establishment shall cease to be operated for more than ten consecutive days.

2nd. That the subject of insurance, as set forth in the plaintiff's statement, was a saw mill, machinery, cider mill and press attached, and lumber, and tools, and personal property therein; that the said saw mill was in a decayed condition and had partly fallen down as the result thereof, and the said plaintiff had sold a part of the brick of said structure and removed therefrom a part of the rafters of said saw mill which had ceased to be operated for several years prior to the fire The policy as recited in said plaintiff's statement provides, "If a building or any part thereof shall fall except as the result of fire, all insurance by this policy on such building or its contents, shall immediately cease." That the upright saw in said saw mill had also been removed from the alleged building destroyed by fire, as well as part of the machinery and the cider mill and press were not in the building alleged to be insured at the time of the fire.

3rd. That the plaintiff failed to furnish the company defendant with an itemized statement of his loss, as required by the conditions of his policy and the demand made upon him by the company.

A motion was then made for judgment for want of a sufficient affidavit of defence; but the Court below, Stewart, J., overruled the motion, whereupon this appeal was taken.

J. St. Clair McCall and *John F. Kell* for appellant.

Geise & Strawbridge and *Niles & Neff* for appellees.

April 25th, 1898. PORTER, J.—The subject of the insurance as set forth in the

plaintiff's statement was a saw-mill, machinery, cider-mill and press attached, and lumber and tools, and personal property therein. The plaintiff alleges a total loss. The policy sued on provides that "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the subject of insurance be a manufacturing establishment and ceases to be operated for more than ten consecutive days." The affidavit of defense alleges that the subject of the insurance was a manufacturing establishment and contents, and that at the time of the alleged fire, it had ceased to be operated for more than ten consecutive days.

The policy further recites that "If a building or any part thereof shall fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The affidavit alleges that the saw-mill was in a decayed condition, and had partly fallen down as a result thereof.

Without discussing the merit of the allegations of the affidavit respecting the failure to furnish a truthful and an itemized statement of loss, we are of the opinion that the two allegations of the affidavit above set forth sufficiently aver a breach of the conditions of the policy, to prevent the entry of the judgment for the want of a sufficient affidavit of defense.

The assignments of error are dismssed, and the order of the Court below is affirmed.

Gantz's Appeal.

Will— Construction of— Heirs— Specific legacies.

Testator gave a specific bequest to his son and then bequeathed his daughters and granddaughters share and share alike and then two grand-sons "share and share alike with my other heirs," HELD, (reversing the Court below) that the son must share in the residuary estate.

It is elementary law that the heir shall not be deprived of his inheritance except by express words or an implication from which there is no escape. The inference to be drawn is one of preferenee for an only son rather than an intention to exclude him.

Appeal from the decree of the Court of Common Pleas of York County.

The Auditor's report and opinion of the Court below, Bittenger, P. J., are given in Gantz's Estate, 10 YORK LEGAL RECORD 201.

From the decree there entered this appeal was taken.

Jas. G. Glessner for appellant.

W. B. Gemmill, W. L. Ammon and *E. E. Allen* for appellee.

April 25th, 1898. PORTER, J.—The Court below was right in holding that the decedent died intestate as to his whole estate. The difficulty lies in construing the language of the testamentary paper. The words, "share and share alike with my other heirs," in the third paragraph of the will, clearly evince an intention that the estate shall, (after payment of the three legacies) be distributed among the testator's heirs in certain proportions.

"As a general rule of construction, it is well settled that a devise or bequest to heirs or heirs at law of a testator or to his next of kin will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will;" Buzby's Appeal, 61 Pa. 116; Stewart's Estate, Bell's Appeal, 147 Pa. 383. The Court below has held that the giving of a specific legacy to John W. Gantz of $110, evinces an intention on the part of the testator to exclude the legatee from participation in the general distribution of the estate, although the legatee was his only living son, and one of his immediate heirs. We think no such conclusion is to be drawn from the giving of the legacy. In each of the cases above cited, a trust for life was created for a child, with remainder over to the right heirs of the testator. On the death of the child it was held that the right heirs of the testator were those living at his death, and that notwithstanding the limitation of the child's interest to a life estate, he should not be on that account excluded. It is elementary law that the heir shall not be deprived of his inheritance except by express words or an implication from which there is no escape. We think in this case that the legacy to John W. Gantz does not raise this implication. The inference to be drawn from the giving of it is one of preference for an only surviving son, rather than of an intention to exclude him.

Again the amount of the legacy is un-

usual, and bears the impress of a compensation or an adjustment rather than a benefaction or distribution. We therefore hold that John W. Gantz is entitled to share with the other heirs in the distribution of the estate as indicated in the terms of the will. Francis S. Tyrell and Chester G. Hersey receive their legacies, but do not participate in the general distribution because they are not heirs of the decedent. Elizabeth J. Tyrell and Samuel G. Hersey, the respective parents of the legetees both being alive.

The result of this construction of the will is a distribution of the estate, (after payment of the three specific legacies) among John W. Gantz, Lydia Florence Wiley, Samuel G. Hersey, and Francis Hersey in equal shares.

The decree of the Court below is reversed, and the record is remitted in order that distribution may be made as is herein indicated.

COMMON PLEAS.

Eaton et al. v. Eastern B. & L. Association et al.

Building Association—Insolvency—Withdrawing stockholders—Receivership.

Defendant association was compelled to purchase real estate taken as security for loans made. Real estate depreciating in value, an appraisement was made and the loss charged off to each share of the series. Plaintiffs gave notice of a desire to withdraw, whereupon the association deducted from his share the amount of loss charged to it and tendered the remainder, which plaintiffs refused to take and filed their bill, asking for the appointment of a receiver, alleging mismanagement in alleged borrowing of money and danger of further loss if the association be allowed to continue. Defendant denied mismanagement and reitterated its willingness to pay plaintiff amount due on his share after deducting the loss properly charged to it. HELD, that the bill must be dismissed at the cost to the plaintiff.

It is no objection to the bill that the plaintiff has a remedy at law. It must be as complete and convenient as his remedy in equity, to oust equitable jurisdiction.

In a case of stockholders against a corporation, involving intricate accounts, questions of acts *ultra vires* by the officers, calculation of losses, in real estates, deduction from withdrawal value of shares of stocks, payment of dues, insolvency and marshalling of assets, is not only the appropriate remedy, but necessary for the equitable adjustment of the rights of parties.

Defendant association is insolvent, because it cannot pay back to stockholders the amount of their actual contributions, dollar for dollar.

These plaintiffs cannot maintain their bill because the defendant corporation has tendered them the full withdrawal value of their shares, less estimated losses, and now offers to pay them such sums.

A building association has the right to retain from such withdrawing stockholders a portion of the probable loss sustained by reason of the purchase of real estate, sold on its mortgage, which has depreciated in value even before the loss has been fully determined by an appraisement.

The fact that the directors borrowed money in excess of the amount fixed by the Act of 1895, is no reason for charging them with the loss on real estate. The association got the money borrowed by the directors and it was used in redeeming maturing series and in the business of the corporation. Equity requires, therefore, that it and its stockholders shall be estopped from repudiating liability for the moneys so received for its and their use, and the proper satisfaction and payment of the stockholders.

Where no good can be subserved but much harm may be inflicted by the appointment of a receiver, the Count exercising a wise discretion, will refuse to entertain a bill and appoint a receiver.

Bill in equity and answer.

The facts and questions of law are fully set forth in the Court's opinion.

J. St. Clair McCall and *Niles & Neff* for plaintiffs.

Latimer & Schmidt for defendants.

May 9th, 1898. BITTENGER, P. J.—This case was heard on May 3rd, 1898, the defendants having filed their answer on the day of hearing, before the taking of testimony. No replication was filed. I find the following facts:

1st. The Eastern Building and Loan Association of York, Pa., one of the above named defendants, is a building and loan association doing business in the said county of York, and the other defendants are directors and officers of said association

The said plaintiffs are stockholders in the said association, the said George B. Eaton being the holder of two shares in the 21st series, and has paid into said association $78, and the said Sadie C. Eaton, being the holder of two shares in the 21st series, she having paid $80.50 into said association.

2nd. That on March 8th, 1898, Geo. B. Eaton, one of the plaintiffs, gave notice to the proper officers of said association that he desired to withdraw from the same, and made claim on the same as a withdrawing stockholder, under the acts

of assembly and by-laws of the association. On the 16th day of April, 1898, Sadie C. Eaton, the other plaintiff, gave similar notice, and made similar claim as a withdrawing stockholder.

3rd. That on the 7th day of April, 1898, Jonathan Jessop, Secretary of said association, tendered to said George B. Eaton (one of said plaintiffs) the sum of $53 42, which sum was claimed by said Jessop to be in full of the amount to which said George B. Eaton was entitled upon such withdrawal; that said amount so tendered is $24.58 less than the amount actually paid by said George B. Eaton upon said shares of stock into said association. And on the 18th day of April, 1898, said association submitted to Sadie C. Eaton a statement showing the amount due to her as being but $55.92, claiming that the sum of $24.58 out of said sum of $80.50 so paid by her was lost upon real estate.

4th. That the said association, prior to 1895, had loaned to stockholders large sums of money, secured by liens on their real estate, without other security; and was compelled to buy said real estate in said year, to protect itself from loss. Said real estate was valued at the sum of $28,-202.02 as contained in annual reports of the association.

5th. That under the orders of B. F. Gilkerson, State Commissioner of Banking, made February, A. D. 1898, the said association, by a committee of its stockholders, did, in the month of February, 1898, re-value the real estate of said association, all of which had been necessarily acquired by it by purchase for the security of loans made thereon reducing the value of said real estate from $28,-202.01, to $21,050.00. The report of said committee was presented to and adopted by the Directors of the Association, at a meeting held on February 26, 1898, and a circular notice to withdrawing stockholders was issued in pursuance of the said action of the Directors.

6th. In pursuance of said action had on order of the Banking Commissioner Gilkerson, said association on or about April 8, 1898, served the following notice on withdrawing stockholders:

"To the members of the Eastern Building and Loan Association of York, Pa.

The Board of Directors beg leave to report, that on December 14th, 1897, they made a vigorous effort to sell the real estate now owned by the association. That it was extensively advertised in the City papers and by poster. That failing to sell at that time, the sale was adjourned to January 11th, 1898, the property being readvertised and more hand bills being posted; and that this second effort also failed to secure buyers.

The Commissioner of Banking, at Harrisburg, Pa., called our attention to the matter, and directed us to have our real estate revalued at a lower figure, such as it will bring in the market, and to charge the depreciation off to the several series. Under his direction that was done, and any member withdrawing will be paid the amount paid in by them, less such depreciation.

8th. That after the purchase of the real estate the said association borrowed upon notes executed by the President and endorsed by the Directors, large sums of money to enable the association to continue business. The indebtedness in August 31, 1896, was $27,789.00 including $8,379.00 due stockholders, in the 15th series, then matured, and its present indebtedness is $23,550 00, of which $8,-000.00 is secured by a mortgage on its real estate, and the balance consists of loans from banks and individuals.

In the execution of said $8,000.00 mortgage, a deed was made to Moses Thomas, one of the Directors, by the association. He executed the mortgage and immediately reconyeyed the real estate to the association subject to the mortgage.

9th. The aggregate amount borrowed by the Directors, existing as a debt of the association, is largely in excess of the twenty-five per centum of the withdrawal value of stock issued by said association, as limited by the act of June 25, 1895.

10th. The $8,000.00 realized upon the said mortgage of the association's real estate, was appropriated to payment of outstanding notes, to banks and individuals, endorsed by the directors.

11th. No fraud or mismanagement has been shown on the part of the officers and directors of said association in the management of its affairs, except it be in the borrowing of moneys in excess of the amount prescribed by law. They made several efforts to sell the real estate, of the association, acquired in the manner

before stated, but failed to sell on account of dullness in the real estate market, largely occasioned by the failure of several other local building associations, in 1895.

12th. The entire number of shares in the 21st series is forty-one, of which thirty-two have been borrowed. The total number of shares in all the series now running is 282. Seven shares are unredeemed, including the four shares of the plaintiffs.

13th. The loss, the proportionate part of which the plaintiffs are asked by the association to have deducted from the amount otherwise due each of them, in withdrawing, as the withdrawal value of their shares, was occasioned by the depreciation in the value of the real estate of the association. The said loss per share, according to the revaluation of the said real estate is $12.29 after deducting therefrom the proportionate shares of the earned profits, up to the date of the last annual statement, August 28th, 1897.

14th. Before the filing of the bill and also in open court, before the taking of testimony, the association tendered to the plaintiff, George B. Eaton, $53.42 as the total amount due him on his two shares of stock, after deducting losses on real estate, and to Sadie C. Eaton $55.92 on her two shares of stock, after deducting such loss, as the full withdrawal value of their respective shares, according to a calculation under the revaluation of the real estate of the association.

15th. That on all withdrawals of stock after the revaluation of real estate the proportionate share of the losses occasioned by the reduction in the value of the real estate, was deducted from the amount paid to withdrawing stockholders; and all withdrawing stockholders accepted, in full payment of their claims on stock the said net amount, after deducting their proportionate shares of said losses except the plaintiffs.

16th. The income from the real estate of the association for the last year was $1,800.00. The insurance, taxes, water rent and repairs, amounted to $719.00, leaving a net income of $1,081.

17th. The association is not now able to pay the stockholders dollar for dollar, paid in by them at the present estimated value of the real estate. It has little or no cash money on hand at this time. It can only pay the plaintiffs the amount tendered to them respectively by the association if the real estate sells for its present valuation; and the association is therefore insolvent.

CONCLUSIONS OF LAW.

The answer raises the question of the right of the plaintiffs to maintain their bill, first: because they have no adequate remedy at law; second: because George B. Eaton having given notice of withdrawal and the thirty days having expired before the filing of the bill, is a creditor only, of the association, and not a stockholder, and third: because the defendant corporation is not insolvent; has tendered the plaintiffs the full withdrawal value of their shares, and is ready and willing to pay them the respective amount due them.

The first objection of the defendants to the maintenance of the bill is not well grounded. It is not sufficient that the plaintiff have a remedy at law. It must be as complete and convenient as his remedy in equity, to oust equitable jurisdiction. "Jurisdiction in equity depends not so much on the want of a common law remedy as upon its inadequacy; and its exercise is a matter which often rests with the courts;" Bierbower's Appeal, 107 Pa. 14; Appeal of Brush Electric Co., 114 Pa. 574; Johnson v. Price, 172 Pa. 427; Penna. Co. v. Franklin Fire Ins. Co., 181 Pa. 40. Mortland v. Mortland, 151 Pa. 591.

In this case of stockholders against a corporation, involving intricate accounts, questions of acts *ultra vires* by the officers, calculation of losses in real estate, deduction from withdrawal value of shares of stock, payment of dues, insolvency and marshalling of assets, we consider this not only the appropriate remedy, but necessary for the equitable adjustment of the rights of parties. An action of law in such a case, with a trial before a jury however intelligent, would afford a bungling and inadequate remedy, and be entirely out of place.

The second objection to the jurisdiction interposed by the defendant, is invalid because one of the plaintiffs, Sadie C. Eaton, is admittedly a stockholder. It is true, under the authorities, the plaintiff, George B. Eaton, is now a creditor of the association. "But while in a quali-

fied sense, withdrawing stockholders may be considered creditors of the association, their rights, as against those with whom they have been associated, are very different from those of general creditors whose claims are based wholly on outside trans actions. If the association had been prosperous they have a right, under certain limitations and restrictions, to demand and receive their proportionate share of the accumulated fund, but if bad investments have been made or losses have been sustained before actual withdrawal, they must bear their just proportions thereof;" Christian's Appeal, 102 Pa. 189. See also Laurel Run B. A. v. Speering, 106 Pa. 334.

A single stockholder, if he pleases, may file a bill against the corporation although the more usual course is for one or more to proceed on behalf of all; Adams Equity, 257.

The difficulty of the plaintiff's contention is not in these technical objections to the jurisdiction, but on more substantial grounds. It rests in the notice of withdrawal by the plaintiffs, and the insis tence upon their right under the act of assembly and the by laws of the association, and the tender to the plaintiffs by the association of the amount payable upon their respective shares, as their withdrawal value, after deducting estimated losses upon the real estate of the corporation. It is found by us to be insolvent on well established decisions, amongst which is the case of Towle v. American B. & Inv. Society, 61 Fed. Rep 446, in which it is held that, "The so called insolvency is such a condition of the affairs of the association as reduces available funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to stockholders the amount of their actual contributions, dollar for dollar.

In consequence of the insolvency of the association, if the bill were filed by stockholders who had not given withdrawal notices and been tendered the amount payable on their shares, after deducting losses, we might feel it incumbent upon us to appoint a receiver to preserve the assets from loss and equitably wind up the affairs of the society.

We think the position of the association that these plaintiffs cannot maintain their bill because the defendant corporation has tendered them the full withdrawal value of their shares, less estimated losses, and now offers to pay them such sums, is tenable and requires our adoption.

Both the acts of April 12, 1859, P. L. 544, and April 29, 1874, P. L. 97, provide that a withdrawing stockholder shall be entitled to receive "the amount paid in by him or her, less all fines *and other* charges." Article 2, Section 7 of the by-laws, printed in the books of the plaintiffs, is in accordance with the said acts of assembly, providing for the deduction of the withdrawal value of shares, and *other charges.*

A member withdrawing must bear his share of the losses; Christian's Appeal, 102 Pa 184 9; and a member cannot withdraw when the association is known to be insolvent; Endlich on Building Associations, Sec. 92.

The society has the right to retain from withdrawing stockholders their proportion of *probable losses* from depreciation of real estate purchased by the association. The Society may have the property appraised by a committee, and fix the loss and assess the same on each share of stock *pro rata*; Endlich on Building Associations, sections 63, 64. It has the right to retain from such withdrawing stock holders a portion of the probable loss sustained by reason of the purchase of real estate, sold on its mortgage, which has depreciated in value even before the loss has been fully determined by an appraisement; Kamblock v. Building Association, 8 P. L. J. (N. S.) 39; Poffert v. Building Association, Ibid 40.

In this case the real estate had been valued by a committee of the association, appointed on the orders of the Banking Commissioner, and the loss ascertained and adjusted at $12.29 per share, adopted and acted upon by the association in all cases after such revaluation and adjustment.

The association tendered to the plaintiffs the withdrawal value of their shares, with the proper deduction for losses ascertained as stated, before the filing of

bill, and still stands ready to pay these amounts.

But it is said that these amounts tendered, are not according to the acts of assembly and the by laws, for the reason that the losses should be visited on the directors, because they and their predecessors borrowed sums of money in excess of the amount allowed to be borrowed, under the act of 1895; that these acts are acts *ultra vires* and illegal, and that therefore the loss on real estate must be sustained, not by the stockholders, but by the directors.

These moneys were not borrowed fraudently and in bad faith to subserve selfish ends, but to take the place of funds tied up in the purchase of real estate which had been taken as security for moneys loaned to stockholders and which real estate the association was compelled to purchase for its protection. The loans were contracted for the purpose of paying off stockholders in maturing series, and pre serving the credit and life of the association. They were appropriated to that object while the association was believed to be solvent, and have been honestly ac counted for. Are the directors to have the losses of the association imposed upon them because the real estate, believed to be worth over $28,000.00 at the time of contracting of the loans could not be sold, and depreciated in value nearly $7,000 00 to the time of the valuation, viz, to $21,050.00.

The loss is on the real estate, and not by reason of the indebtedness contracted by the directors. The association got the money borrowed by the directors and it was used in redeeming maturing series and in the business of the corporation. Equity requires, therefore, that it and its stockholders shall be estopped from repudiating liability for the moneys so received for its and their use, and the proper satisfaction and payment of the stockholders. "He that asks equity must do equity." The plaintiffs have suffered nothing by the furnishing of the moneys advanced by the directors to the association, by which it and all its stockholders were accommodated and served. Hence it would be most inequitable to visit the losses of the association upon the direc tors, because they are guilty at most of a mistaken view of their rights and powers, and an error of judgment. We are not prepared to sanction such manifest hardship.

The plaintiffs will not obtain as much as the amount tendered them by the defendant corporation, if a receiver should be appointed and the affairs of the association wound up, perhaps at a sacrifice to the association and great expense, because, then, as now, the proper proportion of losses in real estate must be taken from each share of the stockholders All the other withdrawing stockholders have accepted the adjustment of their claims, as made by the Society, on the estimated losses shown by the said revaluation of its real estate, and born their share of said loss.

No good can be subserved but much harm may be inflicted by the appointment of a receiver. In such circumstances, the court exercising a wise discretion, will refuse to entertain a bill and appoint a receiver.

After hearing and full consideration, it is ordered, adjudged and decreed that the injunction granted in this case be dissolved and the bill be dismissed, at the costs of the plaintiffs.

C. P. of Lackawanna Co.

Borough of Taylor v. Postal Telegraph and Cable Company.

Borough ordinance—Right to tax poles of Telegraph Company—Police power.

An ordinance imposing a license fee of one dollar per annum upon telegraph poles within the borough limits, for the purpose of defraying the expenses of inspection of the same, is clearly within the power of the borough to enact under its police powers.

The power over its streets and highways, and its right to legislate with regard to them for the general good is not less in a borough than in a city.

Exceptions to report of referee.

On January the 10th, 1894, the Council of the Borough of Taylor passed a series of ordinances which were approved on the 10th day of January, 1894, entitled "Ordinances of the Borough of Taylor, Lackawanna County, State of Pennsylvania," the enacting clause of which is as follows: Be it enacted by the chief burgess and the town council of the Borough of Taylor, County of Lackawanna and State of Pennsylvania, and it is hereby ordained by the authority of the same, that the laws, ordinances and regulations hereafter contained shall con-

stitute the laws, ordinances and regulations of the Borough of Taylor, aforesaid. Then follow fourteen titles, the fifteenth reading as follows:

TITLE NO. 15, POLES AND WIRES.

Section 1. The High Constable shall inspect all poles used to carry wires erected upon the thoroughfares or public grounds of the borough by any person or corporation, and the High Constable, aided by the police under his charge, shall see that the said poles and wires are kept in a safe and good condition; and if the High Constable or police shall find any defects in the condition of the said poles or wires, he or they shall report the same to the Burgess forthwith.

Section 2. The Burgess on receiving notice of any defect in the condition of the electric wires or poles within the limits of the borough shall notify the owner or manager of the corporation or persons owning the said wires or poles, to repair the same immediately and put them in a safe and trustworthy condition, and if the said owner or manager of the corporation or persons owning the said wires or poles fail to do so with the dispatch which the case requires, the Burgess shall instruct the High Constable to remove the danger, if any exists, by reason of any defective wires or poles and the cost of such removal shall be defrayed by the person or corporation owning such poles or wires.

Section 3 Every telephone, telegraph, electric and electric railway company erecting or maintaining poles or wires within the borough limits shall pay an annual license fee of one dollar for each pole and two and one half dollars for each mile of wire so erected or maintained; said license fee to be paid on or before the first Monday in April of each year.'

Early in the year of 1895 the Borough of Taylor demanded from the defendant Company the sum of $91.17 being for the license fee for the year ending April 1st, 1895, in pursuance of the above ordinance. The defendant company refused to pay this sum on the ground that the Borough of Taylor had no legal authority to lay this license tax and if it did, the amount was excessive and exorbitant. Upon this refusal to pay said amount the Borough, through its attorney, brought an action against the Company before a Justice of the Peace, who gave judgment in favor of the plaintiff and against the defendant for the amount claimed. From this judgment the defendant appealed and by agreement the case was afterwards referred to a referee. On December 29th, 1897, the Referee filed his report directing judgment to be entered in favor of the plaintiff and against the defendant. The defendant filed numerous exceptions to the report of the Referee.

Watson & Zimmerman for exceptions.
John M. Harris, contra.

March 19th, 1898. ARCHBALD, P. J.—The ordinance in question does not show as clearly as it might that the so-called annual license fees imposed by it are for the purpose of defraying the expense of inspecting the poles and wires of the several telephone, telegraph and electric railway companies located in the borough; but this may be fairly inferred from the connection. The section which imposes the fee immediately follows others which direct that such inspection shall be made and how the correction of defects found by it shall be enforced. The only reasonable conclusion from this is that all the sections hang together and that the one was intended to provide the means for the others. In this view the ordinance is clearly within the power of the borough to enact.

Whatever views, however, we might have upon the subject must yield to the case of McKeesport v. Railway Co., 2 Superior Ct. Rep. 242. The license fee or tax there enforced was imposed by an ordinance which is bald of any suggestion as to its purpose and simply levies the tax without any further why or wherefore. But the court supplying the purpose from the duty of the municipality to make inspection sustains the ordinance as a proper police regulation on that sole ground. "The introduction and construction of telegraph, telephone, electric light, electric power and street car lines," says Willard, J., "through, over and upon city streets, the erection of poles and stringing of wires thereon charged with dangerous agencies as motive power, call for the exercise of more than ordinary care, not only in the erection of poles and proper adjustment of the wires, but in the maintenance and repair of the same and a vigilant and constant inspection, and every municipality owes the duty of rigid

inspection to its citizens. In the performance of this duty the proper authorities of the city of McKeesport had a right to pass the ordinance above quoted, and neglect on their part to have done so would have been neglect of public duty."

It is further to be noted that this decision also sustains the power to pass such an ordinance as that under discussion. This was the question, in that case as it is here, but it was declared that "the right to pass the ordinance as a police regulation is too well settled to admit of discussion;" citing Western Union Tele graph Co. v. Phila., 22 W. N. C. 39; Phila. v. Amer. Union Telegraph Co., 167 Pa. 406; City of Chester v. Phila., Reading & Pottsville Co., 148 Pa. :20; City of Allentown v. West. Union Telegraph Co., 148 Pa. 117; Chester City v. West. Union Telegraph Co., 154 Pa. 464. The only difference between the two cases is that there it was a city ordinance and here it is the ordinance of a borough, but this in effect is no difference at all. The power over its streets and highways, and its right to legislate with regard to them for the general good is not less in a borough than in a city; Bethlehem v. Pa. Tel. Co., 4 Northampton 289; and these were expressly recognized by Paxson, J., in Millerstown v. Bell, 123 Pa. 151, as amply sufficient for the passage of just such an ordinance as we have here.

The exceptions are overruled and the report of the referee is confirmed.

SUPERIOR COURT.

Eichelberger's Estate. No. 3.

Legacy—Charitable bequest—Payment of.

Testator by his will gave and bequeathed "unto the Mayor and City Councils of the City of York, my native place, the sum of ten thousand dollars in trust, the principal to be invested under the direction of the Orphans' Court of York County, and the annual income thereof to be distributed among the deserving poor of York under the direction of the Benevolent Society of said City." Before the Auditor appointed to dis ribute the balance on the second account the Benevolent Association claimed interest for a period beginning at the testator's death, but the Auditor disallowed the claim. HELD, (reversing the Court below) that the Auditor must be sustained.

This bequest is not an annuity, but a perpetuity, which would be void were it not for a charitable purpose.

Where by the terms of a will an annuity is given it is presumed to be the intention of the testator that it shall be payable from the day of the testator's death; where there is an absolute bequest of a specific sum in perpetual trust although the income thereof is to be appropriated in a specific manner interest does not commence until a year after death unless there is clear evidence of a contrary intent to be found in the will.

The report of the Auditor and the opinion of the Court below (Bittenger, J.) are found in Eichelberger's Estate, No. 2, supra 1.

From the decree then entered in favor of the York Benevolent Association, this appeal was taken.

E. Chapin for appellant.

E. W. Spangler and *A. N. Green* for appellee.

May 9th, 1898 REEDER, J.—This is a controversy arising from the distribution of money in the hands of the administrator cum testamento annexo of Martin S. Eichelberger This balance is claimed by the special legatee as interest upon the legacy bequeathed to it, upon the theory that the legacy which was one of $10,000 carried interest from the time of the testator's death, and is contested by the appellant as a residuary legatee. The money was awarded to the special legatee by the Court below as interest upon the legacy from the day of the death of the testator. Prior to the filing of this last account the special legacy had been paid with interest from one year after testator's death; this claim is for interest from the day of death up to the date to which interest had been paid. The act of Feb ruary 21th, 1834, provides that legacies if no time be limited for the payment thereof shall in all cases be deemed to be due and payable in one year from and after the death of the testator. The provisions of the act of 1834 must prevail in the payment of interest unless there be language or circumstances upon the face of the will showing that the testator could not have intended the legacy to be payable at the end of the year; Koon's and Wright's Appeal, 113 Pa. 621. Is there any such language or are there any such circumstances manifest upon the face of this will as will remove from this legacy the provisions of the act of 1834? The bequest is "to the Mayor and City councils of the City of York the sum of ten thousand dollars in trust the principal to be invested * * * and the annual income thereof to be distributed among the deserving

poor of the City of York under the direction of the Benevolent Society of said city." At first examination one is impressed with the similarity of expression in the provisions of the will relating to these bequests and those of his relatives which the Supreme Court in Yale's Appeal, 170 Pa. 242; (Eichelberger's Estate, 9 YORK LEGAL RECORD 29,) held to be annuities bearing interest from the time of the death. But a more deliberate and careful examination makes them clearly distinguishable. There the testator bequeathesto the beneficiaries only the interest of a certain fund during his or her life and after death to certain persons nominated in the will. Here is a bequest not for the life of any one, not for a specific time, but for all time of a fund the interest of which is to be used for the comfort and maintenance of the deserving poor of the testator's native city. It is not an annuity but a perpetuity which would be void were it not for a charitable purpose. This case in its facts accords with remarkable similarity to that of Koon's and Wright's Appeal, 113 Pa. 621. In that case as in this the bequest was $10,000, to "The Industrial and Beneficial Institute of Frankford, the principal to be invested and the income to be applied to the payment of taxes and repairs to the buildings and the balance as to part for a free library and reading room and as to another part for supplying fuel and furnishing support and relief to the poor of Frankford residents within a circuit of one mile from the building forever." It is true that the will under consideration provideds that the annual income shall be expended for the benefit of the poor of the City of York and Joseph Wright the testator directed in the will under consideration in the case of Koon's and Wright's Appeal that the income should be expended partly for the benefit of the poor of Frankford But the omission of the word "annual" in the will in the latter case can make no material difference for it would certainly be supplied by judicial interpretation were there any necessity for doing so. Justice Green in delivering the opinion of the Supreme Court, says: "The legacy of ten thousand dollars to the appellee was absolute without any condition as to its payment and no time of payment was expressed in the will which gave it. Literally the case as to the question of interest comes directly within the words of the act of February 24th, 1834, which provides that "Legacies if no time be limited for the payment thereof shall in all cases be deemed to be due and payable at the expiration of one year from the death of the testator." This legislation supplies a testamentary intent and hence where it is claimed that a money legacy shall not bear interest from the expiration of one year after the testator's death the contention must be supported by a clear evidence of an intent contrary to the act to be found in the will of the testator." This case is clearly ruled by the case just cited. The distinction is this where by the terms of a will an annuity is given it is presumed to be the intention of the testator that it shall be payable from the day of the testator's death; where there is an absolute bequest of a specific sum in perpetual trust although the income thereof is to be appropriated in a speeific manner interest does not commence until a year after death unless there is clear evidence of a contrary intent to be found in the will. This view of this case makes it unnecessary for us to discuss the other question raised by the assignment of error in which however we find much merit, viz: Whether the legacy having been accounted for in a prior account by the administrator and distributed to the appellee received by it without objection —no exceptions having been filed to the account or the distribution of the auditor and confirmed by the court, it is not res adjudica and the appellee's day to claim other and further interest has passed.

Decree reversed at the costs of the appellee and record remitted with instructions to allow appellant's claim to the balance in the hands of the administrator less the costs of audit

SUPREME COURT.

Gallatin's Appeal.*

Building Association — Insolvency — Appropriation of payments.

Defendant was a stockholder in a duly incor-

*The opinion in this case shows that the Court did not get beyond the bond on which the suit was brought. The right of a building association to make a contract of this kind, so

porated building association, and the holder of twenty-five shares. He borrowed the full amount of his shares, and received $2500, being their par value, less $5 per share premium. He executed his bond in the penal sum of $2625 conditioned for the payment of ten dollars per week until all the members of that series of the association had received the full amount of their stock, the said ten dollars being the amount of weekly dues and interest on the capital stock held by him. There was a further condition by which he "expressly agreed that all money heretofore paid or hereafter to be paid" by him "into the said Association on the stock I now hold in the same, shall be taken and considered as payments on and in liquidation of this bond." He paid into the Association until it went into the hands of a Receiver, being at no time in default. On a case stated, to determine the amount due from him. HELD, reversing the Court below, that he is to be charged with the amount of money actually received and interest thereon, and credited with the amount paid each week on the stock and interest payments.

Where the appropriation is made at the beginning of the contract, it can not be successfully questioned thereafter.

This language is so clear and explicit that it leaves nothing for either inference or construction. It is an agreement that is mutually binding alike upon the defendant and the association, and was manifestly intended to operate as an express appropriation and not a direction to appropriate.

Appeal from the decree of the Court of Common Pleas of York County.

The opinion of the Court below (Stewart, J.) is given in York Trust, Real Estate and Deposit Co. v. Gallatin, 10 YORK LEGAL RECORD 125.

From the decree there entered this appeal was taken.

Latimer, Chapin & Schmidt for appellant.

Ross & Brenneman and *Cochran & Williams* for appellee.

May 13th, 1898. STERRETT, J.—This appeal, from judgment of the Court below on the case stated in an amicable scire facias sur judgment on bond to the Anchor Building and Loan Association, involves the construction of a clause in said bond providing for the appropriation of payments in liquidation of the debt evidenced by the bond. The facts appear in the case stated and need not be recited here.

When the question, as to the effect of such payments on building and loan association stock, first arose in this State it was held that all payments were to be credited to the debt created by the loan; Kupfert v. Guttenberg Building Association, 30 Pa. 465; Hughes Appeal, Ib. 471. In Building Association v. Sutton, 35 Pa. 463, Mr. Justice Strong, said: "The doctrine of those cases was perhaps in advance of the general understanding * * * What was then said is not to be regarded as laying down the rule that payment of dues on the stock, ipso facto, works an extinguishment of so much of the mortgage. The debtor may apply it, but the payment itself is not an application of the money to the reduction of the mortgage." In Philadelphia Mercantile Loan Association v. Moore, 47 Pa. 233, it was said: "The assignment of the stock as collateral was not a discharge of the loan to the extent of the installments paid. The declaration that it was given as collateral negatives this."

The last cited case shows how the debtor may put it out of his power to appropriate the payments on the stock to the extinguishment of the debt. In that case the debtor made two successive loans from the association, with assignments of some stock as collateral. The court said "he might have appropriated the sum of the installments paid to the discharge of the debt, but he did not On the contrary, on the 8th of October, 1889, when he borrowed from the plaintiffs an additional sum of $400 and made another assignment of the same stock as collateral security for the repayment of the second loan, he elected not to treat the first assignment as a partial payment of the first bond and pledged the stock as a living security for the payment of the second. It is true that without the consent of the

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utterly in avoidance of its charter and so plainly *ultra vires*—the equitable duties of a borrowing member of a building association, and his liabilities in case of insolvency—the injustice to non-borrowers of a building association of throwing all the loss upon their shoulders—the loss to innocent creditors by cutting the securities of the association in half—all these things were apparently overlooked by the Court, which got no further than the appropriation clause in the bond.

The cases cited by the Court are not applicable, since the question of the right of the association to make such a contract was not raised in any of them, neither was the association insolvent in the cases cited.

The decision is at variance with the method of winding up insolvent associations in other States, as given by Judge Endlich, in his work on Building Associations.

company he could not pledge it for the payment of a second debt until that for which it was first pledged had been paid; but when the company assented, as they did, by receiving it as a collateral for the security of the second loan, he had no longer any right to insist that it should be applied to the discharge of the first." In Wadlinger v. Washington B. and L. Association, 153 Pa. 622, the principle of that case was recognized and applied to the case of a second assignment to a stranger.

These and other cases that might be cited distinctly recognize the right of the debtor to direct appropriation of the payments on the stock to the extinguishment of the debt. His power to so direct before the intervention of the rights of creditors cannot be doubted. It is only where the rights of creditors attach by assignment, as in the cases last cited, or by legal process or insolvency as in Strohen v. Franklin Saving Fund and Loan Association, 115 Pa. 273, that the debtor's right of appropriation is forfeited. Until thus forfeited, his right remains. He may appropriate or refuse to appropriate payments on stock in liquidation of the loan, even after default and suit on the bond; Watkin's v. Workingman's B. and L. Association, 97 Pa. 514; or after sale of his realty by the Sheriff; Early and Lane's Appeal, 89 Pa. 441. Bearing in mind these principles, in which all the cases substantially agree, it clearly follows that where the appropriation is made at the inception of the contract of loan, it cannot thereafter be successfully questioned.

The question under consideration was virtually decided in Hemperly v. Tyson et al., 170 Pa. 385. One of the by-laws in that case, as quoted in the charge of the trial judge, provided "that when the stock gets to be worth $200, in the case of a person who has borrowed money on his stock from the saving fund, the stock shall be applied to the payment of the money borrowed, and it shall revert to the corporation." The trial judge charged- "Our judgment in relation to that Article in the by-laws is that it made this stock the primary fund for the payment of the mortgage and the one to which the saving fund should first resort to pay itself back the money it had loaned to Anna Tyson." This construction was held to be free from error. In that case, there was also the following stipulation, in the nature of an assignment: "The amount realized from said stock to be appropriated towards the payment of any amount in which I may be indebted to said association either on account of the principal of said debt, interest, premiums or fines for which I am now or may hereafter become responsible to said association." It is apparent from the language employed that this is not a collateral, but a direct assignment. Speaking of the election by the assignor to appropriate the amount realized from the stock in payment of the association's loan to her, our Brother McCollum said: "This election shows that it was her purpose to make the stock a fund primarily liable for the loan, and the acceptance by the association of the assignment subject to the election involved an agreement on its part to so regard it. The subsequent action of the association was therefore in strict accordance with the mutual purpose and understanding of the parties to the transaction, and with the nineteenth section of the by-laws of the association. * * * The borrower after her election, could not compel the lender to sell her real estate before resorting to the stock fund for payment of the loan, nor could her creditor do so."

In the case now before us, Article IV, Section 5 of the by-laws provides inter alia, as follows: "The security shall be real estate, or by the borrowing member assigning his share or shares of stock to the association in pledge, or by giving the association such bonds or notes in pledge as security for said loan as the directory may deem sufficient." The bond which the association demanded and received from the defendant under this by-law contains this clause: "And further, I, the above named John D. Gallatin, do hereby expressly agree that all money heretofore paid or heretofore to be paid by me nto the association on the stock I now hold in the same shall be taken and considered as payment on and in liquidation of this bond." This language is so clear and explicit that it leaves nothing for either inference or construction. It is an agreement that is mutually binding alike upon the defendant and the association, and was manifestly intended to operate as an ex-

press appropriation and not a direction to appropriate; Chase v. Bank, 66 Pa. 169. Indeed it is difficult, if not impossible to conceive of language more positively expressive of an appropriation; and our judgment would safely and securely rest alone upon the agreement of the parties as clearly and unequivocally expressed by them in the clause above quoted. The application of the payments having been thus explicitly agreed upon at the inception of the contract, the learned Court below erred in not entering judgment accordingly. Both assignments of error are sustained.

Justice Fell dissents.

COMMON PLEAS.

C. P. of Montgomery Co.

In re Historical Society of Montgomery County.

Historical Society—Building of—Taxation.

The Historical Society of Montgomery County is maintained by contributions and the small annual fees paid by the members; its rooms, meetings and library are open to the public; its object is the study and preservation of the history of the county. HELD, that it is an institution of learning maintained by charity, and that its real estate, so far as it is in the exclusive use of the society for the purposes of the organization, is exempted from taxation.

That part of the building rented out for offices is subject to tax, because the business of office renting is foreign to the objects of the society.

Appeal from assessment and taxation.

Jos. W. Fornance for plaintiff.

Wm. E. Solly for County Commissioners.

November 22, 1897. SWARTZ, P. J. —The facts set forth in the appeal are admitted by the County Commissioners, and no objection is made to the form of procedure under which the appellants seek relief.

The Historical Society was incorporated by a decree of this court It has for its object the study and preservation of the history of Montgomery county. It is maintained by contributions and by its members, who pay a small annual fee or contribution. The society was not organized for pecuniary profits, and its members receive no such benefits. Its rooms, meetings and library are open to the public. On December 22, 1896, the corporation purchased a brick building, paying for the same fifty five hundred dollars. The greater portion of the building is used for the purpose of the society —that is, to hold its meetings and public gatherings. One of its rooms is fitted up as the society's library. On the first floor it has exclusive use of the fire proof vaults to protect its valuable books, papers and Historical objects. The first floor not in use for the fire proof vaults aforesaid is divided into offices, and these are rented to tenants. The annual income from the offices is $345. The rents so derived are used in defraying the annual expenses of the society. The building was assessed for the purposes of taxation at ten thousand dollars.

The society claims exemption from tax; and upon a hearing before the Commissioners the assessment was reduced to fifty-five hundred dollars. But no part of the building was, in the opinion of the Commissioners, entitled to exemption from tax.

The building, so far as it is in the exclusive use of the society to carry out the purposes of the organization, should be exempted from taxation. It is an institution of learning maintained by charity. Its rooms and library are not kept for the exclusive use of its members, but are open to the general public without charge. That annual dues may be charged against the members is no legal reason for taxing the property; Mercantile Library Co. v. Philadelphia, 161 Pa. 155.

To rent out and maintain offices for revenue is a business in no way connected with the objects or purposes of the organization. True, the income is used to support the society; but this fact does not change the nature of the business—it is nevertheless carrying on the business of office-renting, although the income helps to support the society.

Such parts of the building as are rented out for profit are subject to tax; Phila. v. Barber, 160 Pa. 123; Mercantile Library v. Phila., *supra;* American Sunday School Union v. Taylor, 161 Pa. 307; Penna. Hospital v. Delaware Co., 169 Pa. 305.

The value of the proportions exempt and taxable must be determined by the assessor under the supervision of the County Commissioners.

So far as there is any evidence before us we are of opinion that the assessment of the entire property at fifty-five hundred dollars is not excessive.

SUPERIOR COURT.

Collins v. The Morning News Co.

Libel—Duty of newspaper to investigate truth of article.

In an action for libel against a newspaper for publishing an item admittedly untrue but without malice, to the effect that a prosecution for malicious mischief and cruelty to animals was pending against the plaintiff, and the plaintiff had been arrested on a bail piece, evidence is not admissible to show that there was in fact such a prosecution against another person for whom plaintiff was bail, and who had been arrested on a bail piece, and that the reporter, who was also a member of the bar, had been led astray by plaintiff's counsel telling him that he had taken out a bail piece "for" the plaintiff.

In such a case the reporter was guilty of negligence in relying for his facts on a brief and hurried interview with the plaintiff's attorney. He should have examined the records and investigated the matter himself before making the publication.

In such case it was not sufficient that the defendant believed the publication to be true at the time. The belief should have rested on reasonable and probable cause.

This article was not a privileged communication, and was published without reasonable or probable cause of the truth of its facts, and the verdict for the plaintiff for $650 should stand.

Appeal by the defendant from the judgment of the Court of Common Pleas of Lancaster County on a verdict for the plaintiff.

This was an action of libel for publishing an article alleging that the plaintiff had been arrested and committed to jail on a bail piece, in a suit for malicious mischief pending against him. The next day an explanation was printed that the plaintiff's name had been printed by mistake, he being not the party arrested, but the bondsman who caused his arrest.

H. M. North, George Nauman, T. B. Holahan and *Eugene G. Smith* for appellants.

Brown & Hensel for appellee.

January 18, 1898. ORLADY, J.—The defendant published in its newspaper, the following: "Arrested on a Bail Piece. There are suits pending against R. C. Collins, John Cassidy and Behny Ross for malicious mischief and cruelty to animals, which will be tried at next week court. It was feared last evening that R. C. Collins would leave this locality and not turn up for trial. In consequence a bail piece was issued and he was committed to jail to await trial, unless he secures other bail." On the day after this publication, the following appeared in the same newspaper: "A provoking error. Through a mix of names The Morning News yesterday stated that R. C. Collins, John Cassidy and Behny Ross had suits pending against them for cruelty to animals and malicious mischief, and that R. C. Collins had been arrested on a bail piece. Of course the public will understand that the item was a provoking error, and that such honorable and well known gentlemen are not defendants at all in any suit. The fact of the matter is that they are bondsmen for one Howard Lehman, who stands charged with the above offences, and they surrendered their bail, taking out a bail piece, upon which he was arrested."

This action was instituted the same day that the alleged libel was published, and resulted in a verdict in favor of the plaintiff.

It was not contended on the trial that the article was maliciously published, and the defendant's second point was affirmed. "As there is no evidence that the defendant in this case had actual malice in publishing the article complained of by the plaintiff, compensation for the injury done to the plaintiff's character is the only legal measure of damages for which a recovery could be had in any event."

The evidence represented by the third, fourth, fifth, sixth, seventh, eighth, ninth and tenth assignments of error was properly excluded, as it was not pretended that the publication was based upon the knowledge of the facts as shown by the rejected testimony. A proper examination of the record suggested in the several offers, or knowledge by the defendant of the facts as stated, previous to the publication, would have made it designedly malicious. The excluded record would have shown conclusively that every material fact stated in the publication was untrue. The published retraction declares the plaintiff to be "an honorable and well known gentleman," and "of course the public will understand that the item was a provoking error." It is only when grave mistakes are made that news-

papers so frankly declare that their news items are to be disbelieved. The only substantive question in the case was one of fact; was the publication of this admittedly erroneous statement made after a proper inquiry into the facts as therein detailed by the newspaper reporter?

The reporter was a member of the bar, and by reason of his professional learning had special knowledge of the place in which to make search for the truth or falsity of the facts given. The investigation of the case could have been easily made prior to the publication as after, and if made, would have disclosed the facts to be as stated in the retraction and as found on the trial. There was no pending proceeding against the plaintiff; he had not been held to answer; he had not given bail for his appearance; he had not been arrested on a bail piece; he was not put to jail; and no one feared or said he feared that "he would leave the locality and not turn up for trial," all of which was discovered within a few hours after the publication, and the defendants admit each and every one of the prejudicial statements to be untrue.

The reporter relied upon a brief and hurried interview with an attorney, which, from his testimony, was incomplete and confusing as to the true relation of the plaintiff to the case about which the inquiry was made. The conversation with the attorney under the facts of the case, instead of furnishing a reasonable and probable cause for the publication, rather made further examination necessary to warrant a cautious man in believing that the plaintiff was guilty of any offense.

It was not a privileged communication. The authorities on which the appellant relies to sustain the argument that it was such are considered in Coates v. Wallace, 4 Pa. Superior Ct. 253, and cannot relieve the defendant in this case. It is not sufficient that the defendant believed the facts to be true at the time of publication; the belief must have rested on reasonable and probable cause; Mulbiddle v. Porterfield, 9 Pa. 137; Chapman v. Calder, 14 Pa. 365; Smith v. Ege, 52 Pa. 419.

In Godshalk v. Metzger, 23 W. N. C. 541, an offer was made of a record of a suit, not in justification, but to show probable cause, and rejected; the court saying, "The reporter may have written this paragraph for the purpose of giving spice to his paper, or from other motives. It is true no offense is named, but it is idle to say that a statement that a man has been arrested and committed to the county prison in default of bail does not mean anything; it means a great deal, and is the more damaging from what it leaves unsaid." In Ingram v. Reed, 5 Pa. Superior Ct. 530, this court held, under facts more favorable to the defendant than in the present case, that even a cursory and superficial examination of a record will not relieve or exempt from the charge of carelessness, when a more particular investigation of the record or case would have elicited the whole truth. The zeal of the reporter for sensational news must be curbed by a careful investigation of accessible facts which would throw light upon the subject-matter before the reading public is furnished with that which may be proper.

This is the requirement of the law, and has been so recognized in all the cases in which the question has been raised. If, indeed, there were means at hand for ascertaining the truth of the matter of which the defendants neglects to avail himself, and chooses rather to remain in ignorance when he might have attained full information there will be no pretense of any claim or privilege; Sheily v. Dampman, 1 Pa. Superior Ct. 115; Conroy v. Times, 139 Pa. 334.

In the light of the facts in this case, the numerous decisions of the Supreme and Superior Courts stamp the article "Arrested on a Bail Piece," as entirely outside the pale of privileged communications, and that it was published without reasonable or probable cause of the truth of its facts. The assignments of error are overruled and the judgment is affirmed.

COMMON PLEAS.

C. P. of Montgomery Co.

Moore v. Blanchette et al.

Real Estate—Payment—Installment.

An agreement for the sale of real estate contained a stipulation that a certain amount was to be paid to bind the bargain, another amount when deed was made, "and the balance to be paid as the purchaser chooses." When the transaction was concluded the purchaser gave as part of the consideration a purchase money mortgage payable in one year. In a suit on the mortgage the affidavit of defence alleged

that "either through the mistake of the scrivener or the fraud of the mortgagee the mortgage was written payable one year after date, instead of payable at the option of the mortgagor, as had been provided in the contract."

The words "to be paid as the purchaser chooses" construed to mean the time and manner—i. e., by judgment or mortgage, in installments or in one payment, and not when the mortgagor chose, for that might never be.

When the time to close the transaction arrived the purchaser should have made her election as to how she proposed paying the balance; and not having done so, the drawing of the mortgage at one year was not of itself fraudulent.

Motion for judgment for want of a sufficient affidavit of defence.

Wm. F. Solly for plaintiff.

Louis M. Childs for Mary Blanchette.

January 22, 1898. WRAND, J.—The affidavit of defence alleges that the mortgage in suit was given as part purchase money of a farm; that the agreement of sale required the payment of "five hundred dollars to bind the bargain, three thousand five hundred dollars on the first day of April, 1893, and the balance to be paid as the purchaser chooses, the interest to be five per cent., payable yearly," etc., the whole consideration was $14,000.

On the completion of the transaction defendant executed and delivered to plaintiff as part of the consideration a mortgage for $10,000, payable in one year after date. The contention of defendant is that "either through the mistake of the scrivener or the fraud of the said Moore the said mortgage was written payable in one year after date, instead of payable at the option of the mortgagor, as had been provided in the contract."

If the contention of the defendant is correct, then the time of payment would depend upon the will of the defendant. If no time is fixed, the debt is presently due; Roads v. Reed, 89 Pa 436; Messmore v. Morrison, Adm., 172 Pa. 300. To assume that in a transaction of this kind a vendor would agree that his money should only be payable at the will of the vendee is to assume that which is highly improbable and not in accordance with business methods. The words "payable *as* the purchaser chooses" does not necessarily mean "when" she chooses, but rather at the time and in the manner to be designated—i e., by judgment or mortgage, in installments or in one payment. This they did when the mortgage was given. That was the time when the purchaser should avail himself of the privilege of deciding *how* the balance should be paid, and this was done when the mortgage was given.

The allegation of fraud consists in the assertion that "the mortgage had been drawn in strict compliance with the terms of the contract of sale;" and we think that in the absence of any election as to the manner of payment that it was not inconsistent with the terms of the agreement. No objection is made that the amount was secured by mortgage, and unless a different period was fixed upon one year would follow the usual practice. No question was asked as to the time, and no misrepresentation therefore as to that fact; and if time was material, it was the duty of the defendant to inquire

In Clark v. Allen, 132 Pa. 40, the affidavit of defence averred that the note was given upon the faith of an agreement made at the time between the plaintiff and the defendant, that the payment of it was not to be demanded or any proceeding had to collect the same until it should be possible and convenient for defendant to spare the amount thereof, etc.; but the affidavit was held insufficient

The expression "as the purchaser chooses" is no stronger than the words "when convenient," and a note with these words was held to be payable in a "reasonable time." Randolph on Commercial Paper, Vol. 1, Sec. 111, ed. 1886, citing Works v. Hershey, 35 Ia. 340 (1872): "A reasonable time having elapsed since the giving of this mortgage, we conclude that even if it read as proposed by defendant, it would now be due." Kreiter v. Miller, 1 Py. 46, is not in point, for there the note itself contained the words "at my convenience whenever I have funds in hand to pay the same." The contract there made the promissor the judge of the time depending on her ability to pay.

The defence in this case is in the nature of a bill to reform the mortgage on the ground of fraud; Sylvius v. Kosek, 117 Pa. 67. To reform it in accordance with the construction placed upon the contract by the defendant would make it read "$10,000 payable as the mortgagor chooses," and thus she might never choose to consider it due and payable. This would make it equivalent to an irredeemable ground rent, which character

of security is no longer favored by the law. It might also be claimed to be payable in goods or services A contract should be construed according to the common understanding of the parties, and surely these people never intended a construction that might lead to a ridiculous conclusion. We can not understand how the defendant was deceived. Before she can say that the mortgage was not in accordance with her choosing she should first show what she wanted. But not having made an election, how can she complain that it was contrary to that which she would have chosen but did not? The mortgage may have been written in accordance with plaintiff's honest interpretation of the contract, in the absence of any demand from defend ant for a different construction; and, as the terms are not unusual, does not bear evidence of fraud, nor do the facts show that the plaintiff has taken any undue advantage of his mortgage.

When defendant executed the mortgage she was put to her election as to the terms of payment. Her silence assumed that the usual terms would be inserted, and she is now estopped.

Rule absolute.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court cases.*)

Application for charter for cemetery—Control of municipal councils—Public and individual injury.—Upon application for a charter of incorporation for cemetery purposes, the court is to inquire whether the articles of association are in proper form, the purpose lawful, and whether it will be *injurious to the public*, but not if it will cause depreciation in the value of individual property lying adjacent to its proposed location. Its *situs* is under the control of municipal authorities who must determine whether interments shall be forbidden altogether, or within certain corporate limits.—*South Easton Cemetery*, (Northampton C. P.) 6 Northampton County Reporter 156.

Criminal law—Indictment—Assault.—On a bill of indictment charging defendant in the first count with rape, second count with attempt to commit rape, third count with indecent assault, and fourth count with assault and battery, a verdict by the jury of guilty on the third count and not guilty on the first, second and fourth counts will be sustained by the court. An acquittal of assault and battery is not necessarily an acquittal of indecent assault when separately charged. There is nothing unusual in charging the different offences embraced in the major charge in different ways and different counts.—*Com. v. Fisher*, (Montgomery Q. S.) 14 Montgomery County Law Reporter 44.

Ecclesiastical law—Practice—Discipline of the M. E. Church of the U. S.—The Methodist Episcopal Church of the United States of America is not a body politic, capable of being sued or of suing. A trustee of the Methodist Episcopal Church, to whom the church is indebted, must proceed to collect his debt in the manner prescribed by the church discipline. This requires him to report the debt to the quarterly conference and then to give a year's notice to the preacher, and upon failure to pay the debt he can sell the church. Failing to do this, he or his executors, are remitted to their action at law, and must turn over the church property to his lawfully appointed successors. —*The Methodist Episcopal Church of the U. S. of America v. Williamson et al.*, (Delaware C. P.) 7 Delaware County Reports 129.

Husband and wife—Desertion—Interest in estate.—A husband has a right to fix the domicil in any part of the world, and it is the duty of the wife to follow him, but the power is not arbitrary, he must show his good faith by some reasonable preparation to receive her. Where a husband left his wife surreptitiously in 1875, went to California, but corresponded with her, sent her money until 1880, and it was contemplated she should join him there, but he did not send her sufficient money to pay for the trip, nor make any preparation to receive her, and did not return until after her death in 1896. HELD, that although up until 1880 there was no willful and malicious desertion, yet that his continued absence after that period was, and that his interest in her estate was forfeited under the Act of May 4, 1855.—*White's Estate*, 28 Pittsburgh Legal Journal 45.

INDEX

OF CASES REPORTED IN THIS VOLUME.

☞ The syllabi are numbered consecutively. The **black figures** refer to these syllabi.

47. Plaintiff became surety in the sum of $1,000 for the appearance of S at a Quarter Sessions Court. Defendant gave plaintiff a common bond in the penal sum of $2,000, conditioned to indemnify and keep harmless plaintiff "from all actions, costs, charges, damages and payments by reason of said obligation." S defaulted and judgment was recovered against plaintiff on the recognizance. He then secured from defendant a judgment, on which was an endorsement specifying that the judgment was given for the purpose of indemnifying plaintiff for one-half of the amount he would have to pay, but agreeing that if plaintiff could compromise defendant should "only be required to pay one-half the amount actually paid by plaintiff on the judgment obtained against him. This endorsement was signed by plaintiff and defendant. A compromise was effected for $1,010.97, and defendant offered to pay one-half of this amount; but plaintiff contended that the $500 abatement he received applied to all the recognizances, and only one-half of it could be used on the judgment. On a rule to open the judgment, HELD, that the defendant can only be called on to pay one-half of the $1,010.97.—*Lauber v. Wagner*, 134.

48. There is no allegation or testimony of fraud, accident or mistake in the preparation of the endorsement, and in view of the difference as to its meaning the Court must construe it as it stands.—*Ib.*

49.—It must be held to express all their negotiations, bargainings and understandings made prior and leading up to its execution.—*Ib.*

OF DRUNKARD, 104.

50. An agreement for the sale of real estate contained a stipulation that a certain amount was to be paid to bind the bargain, another amount when deed was made, "and the balance to be paid as the purchaser chooses." When the transaction was concluded the purchaser gave as part of the consideration a purchase money mortgage payable in one year. In a suit on the mortgage the affidavit of defence alleged that "either through the mistake of the scrivener or the fraud of the mortgagee the mortgage was written payable one year after date, instead of payable at the option of the mortgagor, as had been provided in the contract." HELD, to be insufficient.—*Moore v. Blanchette et al.*, 207.

51. The words "to be paid as the purchaser chooses" construed to mean the time and manner—i. e., by judgment or mortgage, in installments or in one payment, and not when the mortgagor chose, for that might never be.—*Ib.*

52. When the time to close the transaction arrived the purchaser should have made her election as to how she proposed paying the balance; and not having done so, the drawing of the mortgage at one year was not of itself fraudulent.—*Ib.*

RESTRAINT OF TRADE.

53. Plaintiff brought suit to recover damages for the violation of an agreement not to engage in a certain business within a fixed territory. On the trial he showed an agreement on the part of the defendant to sell certain properties and business to the plaintiff and a subsequent conveyance of such properties and payment therefore. Afterwards the agreement on which suit was brought was executed, the previous purchase and conveyance being cited as the consideration for the record agreement. HELD, affirming the court below, that a nonsuit was properly entered, the agreement in restraint of trade being without consideration and therefore void.—*Cleaver's Appeal*, 101.

54. A contract in restraint of trade must be founded in a valuable consideration, must be reasonable, and must impose no general restraint upon trade and industry.—*Ib.*

55. The previous sale being complete in all respect, the duty of the parties on both sides was clearly defined, and the obligation to perform it was comprehended within its express provisions. Hence the obligation of the parties under it could not be a consideration for the subseqent restraining agreement.—*Ib.*

CORPORATION.

INSOLVENCY.

56. Insolvency as applied to a person, firm or corporation engaged in trade is inability to pay debts as they fall due in the general course of business.—*The Finch Mfg. Co. v. The Stirling Co.*, 109.

57. A preference secured by a director from an insolvent corporation in favor of another corporation in which he is also a director, falls within the prohibition of the law and is fraudulent as to other creditors.—*Ib.*

58. The knowledge that a company is probably insolvent is sufficient to put an end to the right of directors to prefer themselves as creditors to the detriment of others, but it does not prevent one director from accepting an advantage conferred by the corporate authorities independent of himself and without his intervention or connivance, which works no disadvantage to the business of the company.—*Ib.*

59. Where a sale of personal property had been made prior to a levy by the sheriff and the company selling the same had been given credit on the books of the party to whom it was sold, although delivery had not been made prior to the levy; HELD, that it was an executed contract and the property was not subject to levy by execution creditors of the company.—*Ib.*

60. *Semble:* That in case of the fraudulent transfer of property by a failing corporation, a single creditor may test the validity of the transaction by levy and sale; it is not necessary to resort to proceedings in equity to set the transfer aside for the benefit of the creditors generally.—*Ib.*

COUNTY COMMISSIONERS.

MONUMENTS.

61. Two of the County Commissioners entered into a contract with a contractor for the erection of a soldiers' monument to be paid by

*Affirmed in 12 YORK LEGAL RECORD 9.

under an order of court, and the sale confirmed September 15th, 1895. There was no contention or dispute as to the order of the liens or the validity of C.'s judgment. On the distribution, the auditor awarded interest on its judgment to the date of distribution, and the Court below confirmed the report. HELD, to have been error.—*Ib.*

96. C. held the proceeds of the sale of the real estate in trust first, for the lien creditors in the order of priority of their liens. The creditors whose liens were discharged were required to look to the fund and interest on their claims ceased on the date of the confirmation of the sale. C. being one of these creditors, received the money for its own use, and as a trustee for all of the creditors it was required in their interest to apply it to the discharge of its debt at once.—*Ib.*

DIVORCE.

COSTS.

97. In divorce attachment will not be granted against respondent, directed to pay costs, without explicit allegation that he is of sufficient financial ability to pay same.—*Fletcher v. Fletcher*, 187.

98. Averment in the petition that the respondent is a "physically strong and robust man, capable of earning good wages," and in a stated employment "is earning and receiving good wages," is not sufficiently specific for an attachment. It should show affirmatively respondent's ability to pay.—*Ib.*

99. *Dubitatur:* As to the court's power to compell payment of court costs by attachment even where respondent is shown able to pay.—*Ib.*

DOWER.

ARREARS.

100. E accepted a purpart of his deceased father's real estate at the appraised value, subject to a dower charge in favor of his mother. He paid her the interest until about four years before her death. A few months after her death he made an assignment for the benefit of creditors, and the real estate was sold for a sum in sufficient to pay the principal of the dower and the arrears of interest. Before the Auditor the widow's administrator claimed a dividend on the arrears of interest, while the heirs claimed the whole of the balance. The Auditor distributed the sum pro rata between the two claimants. On exceptions filed, on behalf of the heirs, HELD, that the exceptions must be sustained.—*Emig's Assigned Estate*, 178.*

101. The arrears of dower, capable of ascertainment, are divested and thrown upon the fund produced by the sale. It is the duty of those interested to see that the property sells for sufficient to cover such arrearages.—*Ib.*

102. The heirs, in the absence of notice, had a right to believe that the proper payments of interest had been made or released.—*Ib.*

103. As the widow can never have any right to any part of the principal, neither can her administrator; especially without proof of notice at the sale, to enable the heirs to protect themselves.—*Ib.*

DRUNKENNESS.

EFFECT OF, 147, 167-8, 174.

104. Drunkenness of a party, to relieve him from a contract, must have been such at its execution that he did not know what he was doing; it must have been such as to suspend the use of reason and understanding.—*Boner v. Myer*, 58.

DWELLING HOUSE, 211.

EJECTMENT, 123, 129-30.

ELECTRIC LIGHT.

DAMAGES.

105. The Act of May 8, 1889, gives to electric light companies the right of eminent domain for the purpose of erecting and maintaining their poles and stringing their wires upon the public highways, but fails to provide a method by which the assessment of damages shall be made. The proper proceeding by a property holder is by an action of trespass on the case for damage actually sustained.—*Zanziger v. The Wayne Electric Light Company*, 44.

106. Inasmuch as the Act of 1889 provides no method for the entering of security and assessment of damages, an electric light company before proceeding to plant its poles should tender to property owners who may be injured a bond approved by the court. The court will however permit security to be afterwards entered *nunc pro tunc*.—*Ib.*

ELECTIONS.

MARKING OF BALLOTS.

107. Two of the ballots were marked with a cross in the circle at the head of the column, but two names in that column were erased and a cross put opposite the names of the candidates in the opposition column. HELD, that the entire ballot must be rejected.—*In re Newberry Election*, 169 *

108. Under the new ballot law, it is not enough that the intention of the voter may possibly be ascertained, or his irregular or equivocal acts explained by evidence dehors his ballot. The purpose of the legislature, in prescribing the form of ballot and specifically directing how it should be prepared and used by the voter, was to avoid all such inquiries and the consequences likely to result therefrom. It was intended that the ballot, when prepared by the voter and delivered to the proper election officer should be per se self-explanatory.—*Ib.*

109. Compliance with the provisions of the Act of 1893, furnishes the only safe guide to the intention of the voter and the facilities offered for such compliance are quite sufficient to render a non-compliance inexcusable.—*Ib.*

110. It is apparent that the electors preparing the ballots, did not intend to vote for every candidate of the Republican party; hence they could not vote for said candidate by marking said ballots with a cross only, in the circle above

* Affirmed in 12 YORK LEGAL RECORD 9.

* Affirmed in 12 YORK LEGAL RECORD 57.

and conditions contained in the original judgment, may safely conclude that, for some reason satisfactory to the parties, they have decided to drop the collection clause from the revival after the execution of the agreement to revive, and the lien of his judgment is not affected by such collection clause in the agreement to revive.—*Ib.*

OPENING OF, 17, 47.

156. Petitioners, certain mechanics' lien creditors of the defendant in the execution, claiming a portion of the proceeds thereof, asked for an issue to determine the validity of a judgment against the same defendant claiming priority in said distribution. On taking of testimony in support of the rule, petitioners claimed the right to call Henry Boll *as under cross-examination*. HELD, that he could not be so called, and his testimony should have been rejected.—*Boll v. Boll, No. 2*, 20.

157. He was not "such a party to the record, or a person for whose immediate benefit this proceeding is instituted or defended, or adverse to the party calling him as a witness," as is contemplated under the Act of May 23, P. L. 158.—*Ib.*

158. The testimony failing to show want of consideration, but proving that the judgment was given to preserve the plaintiff Association from insolvency brought about by the defendant's mismanagement, and also as security for shares borrowed by him from the Association, the rule for an issue must be denied.—*Ib.*

159. It is not necessary to obtain the consent of the Court appointing the Receiver of the insolvent plaintiff in the attacked judgment in order to bring a proceeding of this character.—*Ib.*

160. The fact that the deed from C. Roman Boll to Henry Boll was not recorded until long after the buildings described in the mechanics' liens were commenced, the materials furnished and the work done, has no merit in this connection.—*Ib.*

161. If the petitioners failed to ascertain who was the owner of the real estate at the date of entry of the judgment by the respondent, or to make proper inquiry, they cannot complain of the non-recording of the deed, and claim the proceeds of sale against a valid prior lien. They must attribute their loss to their own want of vigilance and care.—*Ib.*

162. Petitioner, defendant in a judgment, asked to have it opened and stricken off on the ground that it was without consideration and that there was a parol contemporaneous agreement not to enter it. The testimony showed that the petitioner, who was clerk of a building association and a director therein, agreed with other officers of the Association, to contribute to make the Association good, its affairs having become very much involved. In pursuance of this agreement the others contributed notes and stock and petitioner gave his judgment in favor of the Association, which was duly entered of record, petitioner himself writing an order to pay the costs of recording it. Subsequently the Association became insolvent and passed into the hands of a Receiver, and petitioner made an assignment for the benefit of creditors. Petitioner alleged that the agreement was that the judgment should not be recorded, but the evidence contradicted him. HELD, that the judgment will not be opened.—*Mechanics and Workingmen's Building and Loan Association v. Boll*, 24.

163. The four officers having agreed "to make the Association good," and the other three having fulfilled their agreement, the petitioner is bound to his agreement.—*Ib.*

164. The arrangement made by the defendant with the others was a highly commendable and meritorious one to preserve the solvency of the institution, and he should not even if he could, seek to repudiate it now that disaster has befallen it and all those interested through its insolvency.—*Ib.*

165. Defendant's petition averred that the note upon which judgment was entered was not signed by him or by his authority; that it was not his customary method of spelling his name; that he was not indebted to the plaintiff at the time nor did he contemplate making her a gift of that or any other amount. The answer denied all these allegations. HELD, that the evidence in this case was insufficient to induce the Court to open the judgment.—*Dierich v. Shank*, 53.

166. The petition to open the judgment and the answer filed thereto raised a dispute as to how much is due and also whether such amount as may be found to be due is a debt for which a married woman is liable. This is sufficient to open the judgment and let both defendants into a defence.—*Miller & Son v. Weber et ux.*, 64.

PAYMENT, 98, 238.

167. Plaintiff presented his petition asking for a rule on defendant's committee to pay this judgment. The note on which judgment was entered was signed by defendant before he was found to be an habitual drunkard under the proceedings duly held, and approved by the Court. Defendant's Committee in its answer averred that defendant denied ever having signed the note; that he received no value therefor and was not indebted to plaintiff in any amount; that defendant's condition was often such as to render him frequently unconscious of what he was doing; and if he signed the note it was done at one of these times. HELD, that the evidence in this case is not sufficient to induce a Court to open a judgment, and consequently the rule on the Committee to pay must be made absolute.—*Boner v. Meyer*, 58.

168. If the evidence as a whole is sufficient to move a Chancellor to open the judgment for fraud, accident or mistake, the rule to compel the Committee to pay the judgment must be discharged. If not, it must be made absolute, —*Ib.*

PURCHASER.

169. Before plaintiff purchased the judgment he asked defendant as to the payment of the note and was told it was all right, and that it would be paid before it was due. HELD, that defendant was precluded from making any claim of set off that he might have against the original holder.—*Grove v. Nes*, 9.

170. Defendant in a Building Association judgment made an arrangement with M. to borrow the money from him to pay off the Association's claim, the judgment to be assigned to M. as security for the loan. For the purpose of showing M. the judgment, and with the idea that a differently worded judgment would have to be used, but with no thought of the judgment losing its place on the record, the Secretary of the Building Association wrote to its Attorney asking him to satisfy the same and send it to the former. This was done, and as there was a subsequent judgment against the defendant, M. refused to loan the money and the Building Association was not paid, whereupon its petition was filed, asking to have the satisfaction stricken off. HELD, that the judgment must be re-instated, without prejudice to the rights of intervening lien creditors or purchasers.—*Delta Building and Loan Association v. McClune*, 49.

171. Where there was an entry of satisfaction by mistake, or where it had been procured by fraud, the Court will relieve.—*Ib.*

172. Payments made to a Building Association by a borrower are not necessarily credits on his judgment.—*Ib.*

173. E further contended that the reconveyance to A was a satisfaction of the judgment, and excepted to the Auditor's report finding against him. HELD, that the exception must be dismissed.—*Boll v. Boll*, 127.

175. A magistrate may be given jurisdiction of an action to recover the amount of an assessment for a municipal improvement by a waiver of the city's right to recover a penalty, the amount of the claim being thereby kept within $300.—*The City of Chester v. McGeoghegan et al.*, 172.

176. The same principle which permits the waiver of interest, in order to give a magistrate jurisdiction, applies with greater force to a waiver of a penalty; the penalty being merely collateral and foreign to the debt itself.—*Ib.*

177. Defendant was summarily convicted of violating a borough ordinance relating to cesspools. The Justice's record failed to set forth the ordinance or the substance of it. HELD, to be a fatal defect.—*Borough of Hanover v. O'Bold*, 131.

178. Assumpsit was brought before a Justice of the Peace to collect the license required from the defendant as a milk dealer. The record substantially says: "Civil suit, summons in assumpsit not exceeding $300. Claim $2.00." Summons issued, &c, "Sept. 29, A. D. 1887, 10 o'clock a. m., plaintiffs appears through their counsel, W. L. Ammon, Esq., defendant not appearing. John W. Brant, City Clerk, appd. for plaintiffs demanded $2.00 founded on a claim for a City license tax due from June 1st, 1897 to May 31, 1898, due said City by defendant, under an ordinance duly passed by Select and Common Councils of said City of York and approved by the Mayor on the 16th day of March, 1897. After hearing the several proofs and allegations judgment publicly for the plaintiffs and against the defendant by default for two dollars and cost of suit." HELD, that the proceedings must be reversed.—*City of York v. Miller*, 138.

179. There is no doubt of the City's right to impose and collect a license tax on milk dealers for the sale of milk within the city limits, but when they proceed by suit to collect the license the record, as against a certiorari, must be self-sustaining and show sufficient to put the Court at once on the inspection of the record into the possession of all the facts as well as the ordinance imposing the tax.—*Ib.*

180. The Court is not presumed to know local statutes and City ordinances. In suits upon them they must be specially pleaded. Hence the necessity of the Alderman's record referring to them to show jurisdiction.—*Ib.*

181. It is not necessary that the Justice enter upon the record in a civil suit the evidence by which the plaintiff's claim is sustained, but only the kind of evidence upon which it is *founded*.—*Ib.*

182. S, after trial and conviction, but before sentence, fled from justice. His recognizance was forfeited, and the money distributed according to the Act of April 3, 1867. Afterwards he was located in England, and extradition proceedings begun. The County Commissioners having refused to advance the money to bring the fugitive back, the District Attorney petitioned the Court for an order on the Law Library Committee, who had received the net proceeds of the forfeited recognizance, to advance the necessary funds. HELD, that the Committee should agree that the rule be made absolute.—*Com. v. Still*, 6.

183. That the sum asked for was larger than was thought necessary, or no provision made for the security of the fund or a proper accounting thereof, was no reason for resisting the application, since the Court's order could have provided for those things.—*Ib.*

which judgment was subsequently entered, and which was on trial in this suit, were not returned to K, plaintiff, alleging that they had been mislaid. Afterwards plaintiff asked K for security on the new note, and K procured B's endorsement, but B was irresponsible. After K's failure plaintiff investigated B's financial standing and finding it unsatisfactory entered judgment on the note against defendant. At the trial, the testimony of plaintiff and K was contradictory as to whether the new note was taken in payment of the old. The jury found for the defendant. HELD, that the verdict will not be disturbed.—*Hafer v. Boner*, *No. 2*, 17.

199. Plaintiff proved policy and the admission of an adjustment in the affidavit of defence, and rested. Defendant asked for a non-suit, on the ground that the furnishing of proof of loss and an adjustment had not been proven. HELD, that the refusal to grant such non-suit was no cause for a new trial.—*Jacoby & Bro. v. Insurance Co.*, 153.

200. The rejection of evidence, if the same was afterward admitted under another offer, is no cause for a new trial.—*Ib.*

201. After discovered evidence which is cumulative only of what was attempted to be proved on the trial by much stronger and more direct evidence, is not ground for a new trial.—*Loucks v. Lightner*, 157.

JUROR.

202. A member of the County Committee told John C. Garner that he had handed in his name to be put in the jury wheel; the name drawn from the wheel was John C. Gaines, and notice thereof was sent to him through the mail; the notice was received by Garner, as his name was frequently mis-spelled; he signed the return card as Gaines, and attended Court and answered to the name of Gaines and as such served on the jury trying this case; there was no person by the name of Gaines resident in the township. HELD, not to constitute ground for a new trial. —*Loucks v. Lightner*, 157.

NEWSPAPER, **184–7.**

NOLLE PROSEQUI, **73.**

OFFICERS, **42–6, 69–72, 73.**

ORDINANCES, **22–3, 177, 80.**

PAROL GIFT, **129–30.**

PARTITION.

RIGHTS OF CREDITOR.

203. Twenty-two years after the death of decedent, but immediately after the death of the widow, the children instituted proceedingr in partition, and an order was granted to A, one of them, to sell the real estate, which sale was made, confirmed, and account filed and confirmed showing a balance of $1,395.92, which, as no debts were presented, was divided among the heirs, A retaining her share, and being duly discharged as administrator and trustee. Prior to these proceedings K entered a judgment against A. Almost two years after the discharge of A as trustee, K presented his petition asking for a citation on A to pay the amount of the judgment or be attached. HELD, that the citation must be refused.—**Stahl's Estate*, 105.

* Reversed in 12 YORK LEGAL RECORD, 63.

204. A sale under proceedings in partition discharges the lien of a judgment or mortgage entered against an heir of decedent.—*Ib.*

205. While an administrator may apply to the court for appointment of an Auditor to ascertain whether or not there are any liens against the real estate, so as to provide for and protect the same in the distribution, he is not compelled to do so.—*Ib.*

206. The fact that A accepted the duties as trustee to sell the real estate did not make her a trustee for K, and compel her to stand guard for his money at the peril of her liberty.—*Ib.*

207. To compel her to pay K or imprison her if she failed to do so, would be an abuse of the powers of the court and contrary to the Act abolishing imprisonment for debt —*Ib.*

PARTNERSHIP, **6.**

PAYMENT, **50–2, 78, 96, 171, 236–8.**

PENALTY, **175–6.**

POLES, **22, 105–6.**

PRACTICE, **235.**

AMENDMENT.

208. In an action against joint debtors where only one of the defendants has been served, but it is not averred in the statement that the sheriff's return as to the other was nihil habet, and the attention of the court below was not called to the omission, the Supreme Court will sustain a judgment against the defendant served, and permit the statement to be amended nunc pro tunc so as to show that the other defendant had not been served.—*St. Clair's Appeal*, 103.

PREFERENCE, **57.**

PRESUMPTION, **46, 78, 80, 90, 102, 150.**

PROMISSORY NOTE, **76.**

ENDORSER.

209. An endorser on a protested note must, in order to hold a prior endorser, give such prior endorser notice of protest not later than the day following that on which he received such notice.—*Wolf v. Jacobs & Co.*, 10.

210. In a suit by an endorser on a promissory note against a prior endorser, the plaintiff is not entitled to judgment for want of a sufficient affidavit of defense, where the defense alleged in the affidavit is that the defendant received no notice of protest from the plaintiff until October 20th, which notice was mailed on October 19th, and the note was protested and notices sent to the plaintiff on October 12th.—*Ib.*

PROTEST, **209–10.**

RAILROADS.

CROSSING, **194–6.**

DWELLING HOUSE.

211. Where the plaintiff's property consists of a lot 60 by 120 feet fronting on a 50 foot street, with a two story frame dwelling, and the railroad track, as located across the rear end of the lot, will be nineteen feet from the nearest

corner of the house, and the access to and from the property is not materially interfered with, a preliminary injunction to restrain the construction of the road will be refused.—*Milroy v. Pittsburgh, Bessemer & Lake Erie Railroad Co.*, 16.

VIEWERS.

212. Plaintiff located its road on defendant's land, filed its bond and asked for the appointment of viewers. The appointment was made, proceedings had and the report, finding no damages, filed and confirmed by the Court. Twenty-four years afterwards defendant moved to have the appointment stricken off and proceedings vacated. HELD, that he was not barred by any statute of limitations.—*Peach Bottom Railway Co. v. McAllister*, 75.

213. The company has no ownership of the land taken, but only a conditional right of way. Continued occupation of the land cannot confer ownership nor immunity from the payment of damages.—*Ib.*

214. The fact that the road has changed hands, or that the collection of those damages would be an injustice to bondholders or innocent parties, would not be a bar to the proceedings, if the original view was improperly held.—*Ib.*

215. The evidence showing that the notice of the view was served on the defendant's agent, the original proceedings are regular and the petition will be dismissed.—*Ib.*

ROAD LAW.

NOTICE.

216. One of the exceptions to the report of the viewers was that no notice of the view had been served upon the County Commissioners. The evidence showed that a copy had been left with a clerk in the office. In the absence of any assertion or evidence that the notice was not received by the Commissioner in whose district the proposed road was located, the exception will be dismissed.—*Road in York and Springettsbury Township*, 171.

217. The exceptant in this case has no standing to file this exception. He could not be injured by want of legal notice to the County Commissioner, entitled to notice. The provision is manifestly for the protection of the county only.—*Ib.*

REPORT.

218. The report stated that notice was given by "due notice according to law, a copy of which is hereto attached, and said notice has been published in the Stewartstown News, and by hand bills on each end of the proposed alley and at every public place in the Borough." HELD, on exceptions, that the allegations that due notice was given is sufficient, in the absence of proof to the contrary.—*Alley in Winterstown Borough*, 81.

219. A satisfactory method of practice is to accompany the report with the oath taken by the viewers and the order to view.—*Ib.*

VACATION.

220. A petition for vacating and changing a road which gives no facts in support of the allegation that the old road has become useless, inconvenient and burdensome, is fatally defective, and proceedings founded thereon will be set aside.—*Road in Peachbottom and Fawn Townships*, 11.

221. The viewers reported that the old road "will be useless, inconvenient and burdensome when the road laid out as heretofore mentioned will have been opened." HELD, that this is insufficient to support the report and the proceedings must be set aside.—*Ib.*

222. The petition set forth that the road had become "useless, inconvenient and burdensome." HELD, that in the absence of any facts to support this allegation, the order to view should not have been granted.—*Road in Fawn and Peachbottom Townships*, 65.

223. Such a petition must set forth in a clear and distinct manner the situation and other circumstances of that part of the road desired to be vacated.—*Ib.*

224. The viewers found that the part to be vacated "will be useless, inconvenient and burdensome, when the road laid out as heretofore mentioned will have been opened." HELD, that this was equivalent to finding that the old road had not become useless, and the proceedings will be set aside.—*Ib.*

SCHOOL LAW.

EMINENT DOMAIN.

225. The School Board instituted proceedings to acquire ground adjoining a lot already occupied for school purposes but which was too small for the use to which it was put. The exceptant to the report of the viewers alleged that it was not intended to erect a school house on the ground proposed to be taken. HELD, that the exception must be dismissed.—*In re Jackson Township School District*, 15.

226. While the Act of April 9, 1867, P. L. 51, is not sufficiently broad and specific to remove the question from entire doubt, yet considered in connection with the Act to which it is a supplement, the right to take by eminent domain land for the necessary enlargement of school grounds seems to be substantially conferred.—*Ib.*

227. It is not fatal to the report of viewers, in a case of this nature, that the report is not signed by all the viewers; a majority being sufficient to act.—*Ib.*

REMOVAL OF DIRECTORS.

228. The Act of 1893, relating to the removal of School Directors who have failed to provide proper accommodation for school child-

*Affirmed in 12 YORK LEGAL RECORD 46.

See No. 254.

264. The testator devised his real estate to his son Samuel in fee. "Subject nevertheless to the following restrictions, reservations and payments, namely, to pay unto my daughter Susanna and her heirs and assigns the sum of three thousand and three hundred dollars in manner following, to wit: the one-half of said amount in the next year after my death, and the residue being sixteen hundred and fifty dollars in five annual payments * * * and the three thousand three hundred dollars to be a lien on said land bequeathed to my said son Samuel until the same shall be fully paid and satisfied." By a subsequent clause in the will he provided that "if my daughter Susanna should die before her husband and having no children back that the money that I bequeathed her shall fall back to my son Samuel's children and be equally divided among them immediately after my death." The said money was never paid by Samuel Feiser to Susanna, although he accepted the real estate on which it was charged. Subsequently he made an assignment for the benefit of creditors, and this real estate was bought by the defendant. Susanna's husband having died, and she being childless, never having had any children, brought suit to recover the sum charged on the land. The affidavit of defence averred that Susanna was not entitled to the principal, but only to the interest. HELD, that the affidavit is sufficient.—**Rebman v. Shelley*, 95.

265. If she died before her husband, and leaving no children back, the legacy should fall back to Samuel's children. If she survived him, she could dispose of it as she pleased; Rebman's Appeal, 1 YORK LEGAL RECORD 93.—*Ib.*

WITHDRAWAL, **115.**

WITNESSES, **73, 88, 90, 156-7.**

*Affirmed in 12 YORK LEGAL RECORD 7.

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INDEX

OF CASES ABSTRACTED IN THIS VOLUME.